Applying Penalty Enhancements to Civil Disobedience: Clarifying the Free Speech Clause Model to Bring the Social Value of Political Protest into the Balance

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Many federal and state statutes contain penalty enhancement sections that are targeted at eliminating specific conduct, but that have the additional impact of affecting free speech when applied to civilly disobedient lawbreaking. Professor Jacobs criticizes the current free speech clause model, which does not distinguish between expressive and nonexpressive lawbreaking. Professor Jacobs then suggests clarifications to the current free speech clause model, which bring the social value of civilly disobedient lawbreaking into the constitutional balance. She concludes that the constitutionality of penalty enhancements, as applied to acts of civil disobedience, should depend upon a particularized balance that weighs the government's interest in uniform penalty enhancement against the lawbreaking's expressive value.

I. INTRODUCTION

Breaking the law can be a powerful means of expression—its emotive appeal[1] and breadth of impact[2] are far greater than if the message were

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[1] *See, e.g.*, Cohen v. California, 403 U.S. 15, 26 (1971) (stating in the context of word choice that "[w]e cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated").

[2] *See, e.g.*, University of Utah Students Against Apartheid v. Peterson, 649 F. Supp. 1200, 1205 n.9 (D. Utah 1986) ("While the mass media often pays little attention to unorthodox or unpopular ideas, dramatic displays of action capture media attention when words alone will not."); Dan Harrie, *S.L. Councilwoman Leads Protest of JEDI Women at Capitol*, SALT LAKE TRIB., Feb. 15, 1996, at A9 (quoting councilwoman who participated in House gallery protest to say, "Sometimes you have to do this kind of thing to get their attention, and we got their attention"); Dan Levy, *A Decade of AIDS Activism Changed America—And ACT-UP*, S.F. CHRON., Mar. 22, 1997, at A1 ("Angered by widespread indifference and prejudice against people with AIDS, the activist group [ACT-UP] used high-impact media tactics to radically alter the way government and the pharmaceutical industry responded to the epidemic."); Marilyn Martinez, *Learning the Ropes of Civil Disobedience*, L.A. TIMES, Dec. 7, 1996, at B1 (citing an environmental activist for the observation that

delivered by lawful means.[3] Still, the free speech clause of the First Amendment holds no sanctuary for violators.[4] So long as a law is directed at eliminating harmful conduct rather than suppressing disfavored ideas,[5] the government may punish[6] or hold civilly responsible,[7] those who break it.[8] The fact that a particular criminal's purpose in breaking the law was to publicize an

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"[p]articipation by celebrities [in the protests] seems to have helped by landing issues on the evening news").

[3] *See, e.g.*, John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1489–90 (1975) ("[Much] of the effectiveness of [draft card burner] O'Brien's communication . . . derived precisely from the fact that it was illegal. Had there been no law prohibiting draft card burning, . . . he might have attracted no more attention than he would have by swallowing a goldfish.").

[4] *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918 (1982) ("While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered."); Adderly v. Florida, 385 U.S. 39, 48 (1966) (rejecting the assumption, in the context of a peaceful trespass protest at the county jail, "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please"); Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1349 (3d Cir. 1989) (instructing the jury that "[t]he same constitution that protects the defendants' right to free speech, also protects the Center's right to abortion services and the patients' rights to receive those services").

[5] *See* Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) (distinguishing statutes "aimed at conduct unprotected by the First Amendment" from government actions "explicitly directed at expression" for purposes of constitutional analysis); United States v. O'Brien, 391 U.S. 367, 377 (1968) (establishing a four-part test for examining government actions ostensibly directed at conduct but which incidentally impact expression, the application of which hinges on determining that "the governmental interest is unrelated to the suppression of free expression"); *see also infra* notes 57–69 and Diagram A.

[6] Civil disobedient protestors may be subject to state criminal prosecution, such as for disorderly conduct, trespass, or some more specific property crime, or federal criminal prosecution, when their protest activities fall within the definition of federal crimes. *See* Bruce Ledewitz, *Perspectives on the Law of the American Sit-in*, 16 WHITTIER L. REV. 499, 533–69 (1995) (listing the forms of state and federal liability for nonviolent sit-ins).

[7] Protest activities may lead to state tort liability, which may include liability for punitive damages, *see, e.g.*, Operation Rescue-National v. Planned Parenthood of Houston & Southeast Tex., Inc., 937 S.W.2d 60 (1996) (awarding actual and punitive damages based upon a jury finding of liability for civil conspiracy, tortuous interference, and invasion of privacy and property rights) or civil liability under state or federal statutes, *see* 18 U.S.C. §§ 1961–1968 (1984) (providing for civil liability); 8 U.S.C. § 248 (1970) (same).

[8] *See* discussion *infra* Part II.B (detailing how the government usually wins under the lenient *O'Brien* standard).

injustice is no defense to the prosecution.[9] Rather, accepting the penalty is part of the dissident's speech.[10] "Is your law's moral grounding just in light of the sacrifice that I am willing to endure in order to register my opposition to it?" the convicted protesters dramatically ask the majority as they are led off to jail.[11]

Thus, the Constitution does not protect civil disobedients from imposition of punishment for their crimes.[12] Such a constitutional principle would subvert the rule of law upon which this constitutional democracy is based.[13] But what of enhanced punishment for the illegal act based upon the perpetrator's motive or means? Does it follow that augmenting punishments in particular instances

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[9] *See, e.g.*, National Org. for Women v. Scheidler, 968 F.2d 612, 616 (7th Cir. 1992) ("Although the defendants' acts generated publicity which they may have hoped would influence governmental actors, this tangential contact is not sufficient to invoke First Amendment protection for otherwise criminal behavior." (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1981))); *see also* United States v. Schoon, 971 F.2d 193 (9th Cir. 1991) (articulating a four-pronged test for invocation of the necessity defense and reasoning that violators who engage in indirect civil disobedience cases, breaking a law that is not the direct object of protest, will never qualify). *But see* Kenneth R. Bazinet, UPI, Apr. 16, 1987, *available in* LEXIS, Nexis Library, UPI File (reporting the acquittal of Amy Carter and Abbie Hoffman of trespass and disorderly conduct during a protest of illegal CIA activities based upon the necessity defense).

[10] *See, e.g.*, United States v. Dorell, 758 F.2d 427, 432 (9th Cir. 1985) (imposing punishment on a civil disobedient, noting "the validation of [the protest's] sincerity that lawful punishment provides"); Steven M. Bauer & Peter J. Eckerstrom, Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1184–89 (1987) (summarizing the reasons that have been advanced as to why willingness to accept punishment is a necessary element of civil disobedience); Editorial, PRESS-ENTERPRISE (Riverside, Cal.), Dec. 5, 1996, at A10 (commenting upon recent student protests at University of California, Riverside, and noting "[t]he fundamental rule . . . that those who do the crime of conscience are prepared to do the time").

[11] *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 366 (1971). Rawls states that:

> By engaging in civil disobedience a minority forces the majority to consider whether it wishes to have its actions construed in this way [as a persistent and deliberate violation of the public conception of justice], or whether, in view of the common sense of justice, it wishes to acknowledge the legitimate claims of the minority.

Id.

[12] *See, e.g.*, Curtis Publ'g Co. v. Butts, 388 U.S. 130, 148 (1967) (noting that freedom of speech does not include freedom to trespass).

[13] *See, e.g.*, *Dorrell*, 758 F.2d at 435 (Ferguson, J., concurring) ("Regardless of the means chosen, those who practice civil disobedience do not challenge the rule of law or the incidents of an ordered society."); United States v. Berrigan, 283 F. Supp. 336, 339 (D. Md. 1968) ("No civilized nation can endure where a citizen can select what law he would obey because of his moral or religious belief.").

that may include civil disobedience poses no greater constitutional problem than does imposing the base penalty for the unlawful action?

According to current constitutional doctrine,[14] various types of penalty enhancements—whether through victim-targeting or means-targeting statutory provisions or general state law punitive damages rules—are presumptively constitutional because their underlying trigger is unlawful conduct unprotected by the First Amendment's free speech guarantee.[15] As the reasoning goes, simply enhancing a legitimate punishment does not pose any additional constitutional problem so long as the overall enhancement is not aimed at suppressing a particular point of view.[16]

Consider the following examples, however:

1. A group of state university students decide to protest the almost all-white faculty composition, which they believe to be the result of hiring decisions in violation of state and federal statutory and constitutional anti-discrimination guarantees. As a means of protest, they choose a white professor whom they believe to epitomize the faculty's racial composition and quietly walk into his office and sit.[17] When asked to leave, they refuse. They are arrested for

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[14] *See* discussion *infra* Part II.B (explaining and diagramming the current free speech clause model).

[15] *See* Wisconsin v. Mitchell, 508 U.S. 476, 486–87 (1992) (citing the fact that the penalty enhancement statute at issue aimed at unprotected conduct as one reason for its validity); *see also* discussion *infra* Part II.B (explaining how *Mitchell*'s analysis of the hate crime penalty enhancement provision at issue provides a framework that establishes the presumptive constitutionality of other types of penalty enhancements).

16 *See Mitchell*, 508 U.S. 485, 488 (acknowledging that "the only reason for the enhancement is the defendant's discriminatory motive for selecting his victim," but distinguishing the statute's legitimate motive target from illegitimate punishment based upon "mere disagreement with offenders' beliefs or biases").

[17] Building occupation is a common means of student protest. *See, e.g.*, Ann Imse, *Iliff Chapel No Sanctuary for Students*, ROCKY MOUNTAIN NEWS, May 31, 1997, at 4A (noting that divinity school students occupy chapel to protest tenure denial and racism); Edmund Lee, *Race and Class: Inside the Columbia Student Movement*, VILLAGE VOICE, Apr. 23, 1996, at 12 ("Some 100 students are slumped around the marble-and-oak lobby of Columbia University's main college building, which they have occupied and blockaded for three days, the culmination of a school year's worth of agitation and protest for an ethnic studies department."); Amy Wallace & Diana Marcum, *Prop. 209 Foes Seize Building at UC Riverside*, L.A. TIMES, Nov. 12, 1996, at A3 (stating that students occupy building to protest implementation of anti-affirmative action initiative).

Choosing the place of protest for its symbolic significance is almost always a part of trespass protest. *See, e.g.*, Jerry Miller, *Anti-Nuclear Rally Planned at Seabrook; Acts of Civil Disobedience May Draw Arrests Saturday*, UNION LEADER, Apr. 24, 1997, at A4 (quoting an anti-nuclear group member, who said of their planned protest at a nuclear plant that "[a]cts of civil disobedience are symbolic acts. . . . Obviously we won't be able to shut

trespass, which bears a maximum penalty of three months' imprisonment or a $500 fine under state law. However, because they "[i]ntentionally select[ed] the . . . property . . . affected by the crime . . . because of the race [of the] . . . occupant of that property," their ordinary misdemeanor penalty is "revised" to a maximum fine of $10,000 or a maximum one year of imprisonment.[18]

2. Members of a nationwide anti-abortion women's organization decide to protest the injustice of a Constitution that permits abortion.[19] As a means of protest, they gather in large groups, kneel, and pray in front of abortion clinic entrances.[20] They purposely trespass on clinic property for their prayer in order to advertise the conflict between earthly and heavenly law.[21] Moreover, they notify the media in advance of their planned protest targets in order to maximize the publicity for their message.[22] Every time the group holds a prayer vigil, the clinics are forced to shut down, at least for the hours required

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the plant down").

[18] WIS. STAT. § 939.645 (1996), which was upheld in *Wisconsin v. Mitchell*, 508 U.S. 476 (1992).

[19] This hypothetical combines facts from a number of reports of abortion protests.

[20] *See, e.g.*, Woodall v. Reno, 47 F.3d 656, 657 (4th Cir. 1995) ("Plaintiff Concerned Women for America (CWA) alleges that it is 'the nation's largest pro-family women's organization, with . . . 600,000 members.' CWA says that some of its members pray peacefully 'in front of abortion clinic entrances and nonviolently discourage access to the entrances.'"); Veneklase v. City of Fargo, 904 F. Supp. 1038, 1043 (D.N.D. 1995) (protesters pray outside clinic administrator's home); Horizon Health Ctr. v. Felicissimo, 135 N.J. 126, 132 (1994) (weekly prayer vigils outside clinic entrance used as a means of protest); Kenneth Jost, *Justices Split on Abortion Protest Zones*, THE RECORDER, Oct. 17, 1996, at 1 (describing abortion protest injunction case as "aris[ing] from a campaign by New York anti-abortion groups in Rochester and Buffalo that stretched over several years [and] included . . . prayer vigils").

[21] *See, e.g.*, Terry v. Reno, 101 F.3d 1412, 1414 (D.C. Cir. 1996) ("[P]rotesting against abortion 'serves a higher and more compelling purpose than that served by traditional laws against trespass and blocking access to facilities.'"); Anne Kronhauser, *An Activist to Her Bone*, 1990 LEGAL TIMES, July 9, 1990, at 1 ("Anti-abortion protestors believe that a higher divine law permits, even requires, that they disobey judicial orders, and the hard core continues to do so."); Alex Martin, *Liers' War on Abortion*, NEWSDAY, May 7, 1990, at 3 (quoting an abortion protester: "I told the judge that I would not obey him, but I would obey God's law, and he got very mad at me"); Keith H. Sueker, *Anti-Abortion Activists Must Obey Man's Law as Well as God's*, PITTSBURGH POST-GAZETTE, May 25, 1993, at B2 (responding to anti-abortion groups' members' claims of "a divine authority that supersedes the law").

[22] *See, e.g., Abortion Clinics Gird for Four Days of Protest*, ST. LOUIS POST-DISPATCH, July 25, 1995, at 8A (noting that abortion clinics prepared for announced-in-advance protests).

to arrest the protesters and often for the entire day.[23] Clinics targeted for protests lose additional business as clients cancel appointments on nonadvertised days of protest for fear that such protests will nevertheless occur. In one particular incident, the members are arrested and convicted under the Freedom of Access to Clinic Entrances Act (FACE)[24] of obstructing access to the clinic.[25] Whereas the state law trespass penalty would have been a maximum three months in jail or $500 fine,[26] the federal maximum penalties, because these individuals have been convicted of the same offense once before, are $25,000 or eighteen months imprisonment, or both.[27] Because they caused both clinic employees and patients to give up their rights to perform and obtain medical services out of fear, the two trespasses constitute Hobbs Act violations,[28] which together form a "pattern of racketeering activity"[29] under the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970.[30] In addition to establishing the criminal liability, RICO trebles the civil damages that the clinic may recover from the protesters.[31]

3. On the same day as the abortion clinic incident above, a group of six women walk into their own Catholic church in which, with the pastor's permission, a national group dedicated to church reform is scheduled to hold a meeting.[32] As a means of protesting the organization's reform goals, the

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[23] *See, e.g.*, *Terry*, 101 F.3d at 1414 (Anti-abortion protesters participated in "sit-ins" that "did have the effect, temporarily, of interfering with and blocking access to abortion facilities.").

[24] 8 U.S.C. § 248 (1970).

[25] *See* Planned Parenthood Ass'n of Southeastern Pa., Inc. v. Walton, 949 F. Supp. 290, 293 (E.D. Pa. 1996) ("[P]rotesters blocking a clinic door as they pray might violate the Act's prohibition on physical obstruction." (quoting American Life League v. Reno, 47 F.3d 642, 653 (4th Cir. 1995))).

[26] *See, e.g.*, *Thirty Abortion Opponents Arrested at Arkansas Clinic*, N.Y. TIMES, July 9, 1994, at 10 (noting that this would incur the state law criminal trespass penalty for blocking access to an abortion clinic).

[27] 18 U.S.C. § 248(b) (1970).

[28] *See, e.g.*, National Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 253 n.2 (1994) (noting that these were the allegations in the underlying case, but not reaching the issue of whether they stated a Hobbs Act claim).

[29] 18 U.S.C. § 1962(c) (1984).

[30] *Id.* §§ 1961–1968.

[31] *Id.* § 1964(a).

[32] This hypothetical is based upon news reports of several such protests by six women calling themselves Les Femmes de Verite (Women of Truth) that took place in the fall of 1995, disrupting meetings of Call to Action, a group that advocated Catholic Church reforms. *See* Glen Elsasser, *Catholic Tradition, Reform Collide*, CHI. TRIB., Nov. 24, 1995, at 3; Jim

women pray loudly, recite the rosary, and cut the microphone cords, thereby delaying the start of the 200-person meeting.[33] Because the same people had disrupted a similar meeting at a nearby location, police are in attendance, observe the disruption, and arrest the protesters.[34] Like the clinic protesters, the Catholic women are charged with violating FACE,[35] which, although its title refers to "clinics," also imposes its enhanced penalties upon anyone who "by physical obstruction . . . interferes with or attempts to . . . interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship."[36] Although this is only their second such protest, they will be subject to the enhanced "second offense" penalties for the latter action if they are first convicted of the earlier disruption. The two trespasses, aimed at "extorting" the reform organization's right to conduct its business[37] through "force"[38] or "fear,"[39] might qualify as Hobbs Act violations and, because "patterned,"[40] subject the women to criminal and civil RICO liability.[41]

Keary, *Six of Seven Protesters Must Stand Trial*, WASH. TIMES, Sept. 20, 1995, at C7 [hereinafter Keary, *Six of Seven*]; Jim Keary, *Women Say Church OK'd Trespassing*, WASH. TIMES, Oct. 20, 1995, at C8.

[33] The facts of the actual event are disputed:

> [T]he arresting officer described a chaotic scene . . . . The parish education minister testified that she was spit upon and that wires to a microphone were cut amid the screaming of such epithets as "baby killer" and "gay lover" . . . . [The defendants] denied that their actions broke up the meeting, while acknowledging that they talked openly and recited the rosary.

Elsasser, *supra* note 32, at 3.

[34] *See* Keary, *Six of Seven*, *supra* note 32, at C7.

[35] The actual defendants were charged and tried only for state law trespass, which bears maximum penalties of a year in jail and a $2500 fine. *See* Elsasser, *supra* note 32, at 3.

[36] 18 U.S.C. § 248(a)(2) (1970).

[37] *See* Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1350 (3d Cir. 1989) ("Rights involving the conduct of business are property rights [under the Hobbs Act].").

[38] Cutting the microphone cord might qualify as "force."

[39] Coercive speech plus trespass may meet the "fear" requirement. *See* Antonio J. Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805, 828–29 n.122 (1990).

[40] Only two protests can possibly meet the "pattern" requirement if further protests are likely to occur. *See* Town of West Hartford v. Operation Rescue, 726 F. Supp. 371, 373, 375 (D. Conn. 1989) (finding that two protests had already occurred and that "[t]he Center has been shown to be a likely target for repetition of the demonstrations"), *vacated*, 915 F.2d 92 (2d Cir. 1990).

[41] The hypothetical protesters might not meet RICO's "enterprise" requirement.

4. Six members of a group dedicated to environmental preservation decide to protest what they believe to be too lax United States Forest Service logging policies.[42] As a means of protest, they enter a Forest Service-owned logging road, climb onto privately owned logging equipment, chain themselves to it, and affix a banner depicting trees being turned into sawdust.[43] The demonstration is widely publicized.[44] Because of the protesters' actions, part of the private company's logging operations are suspended for most of one day.[45] The protesters are arrested, convicted of criminal mischief, sentenced to two weeks in jail, and required to pay a $250 fine and full restitution to the private company.[46] The company files a civil trespass to chattels action.[47] The protesters concede liability for compensatory damages although they dispute the amount.[48] The jury returns a verdict for the company, awarding approximately $5700 in compensatory damages.[49] Because it also finds it appropriate to "punish" and "deter" the protesters and discourage them and others from engaging in "wanton misconduct,"[50] the jury also awards $25,000 in punitive damages.[51]

These particular applications of presumptively valid penalty enhancement provisions should be troubling. While it is true that the enhancements apply to unlawful, constitutionally unprotected conduct that causes nonspeech-related

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Although the definition includes "any individual . . . or group of individuals associated in fact," 18 U.S.C. § 1961(4) (1984), lower courts have honed the characteristics to require an ongoing, structured organization that has an existence "beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses." United States v. Riccobene, 709 F.2d 214, 224 (3d Cir. 1983). *See also id.* at 222 ("Enterprise" requires an organized structure.); United States v. Turkette, 452 U.S. 576, 583 (1981) ("Enterprise" must have some other purpose than only committing the predicate acts.); United States v. Lemm, 680 F.2d 1193, 1199 (8th Cir. 1982) ("Enterprise" requires a common purpose.).

[42] *See* Huffman & Wright Logging Co. v. Wade, 857 P.2d 101 (1993).

[43] The banner also proclaimed "FROM HERITAGE TO SAWDUST—EARTH FIRST!" *Id.* at 105.

[44] *See id.*

[45] *See id.*

[46] *See id.*

[47] The company alleged that defendants committed a trespass by "intentionally and wrongfully interfering with and depriving Plaintiff of the use and possession of [its] logging equipment." *Id.*

[48] *See id.*

[49] The exact amount is $5717.34, whereas the company had asked for $7818.26. *See id.* at 105–06.

[50] *Id.* at 118 (Unis, J., dissenting) (reciting the standards under which the jury awarded punitive damages).

[51] *See id.* at 106.

harms, in another important respect the above examples are different than the prototypes that prompted the various types of enhancements. Specifically, in the above examples the characteristics that trigger application of the enhancements are not accurate proxies for individually or socially "bad" behavior above and beyond the base act of lawbreaking. In fact, in the above instances, the triggering characteristic acts in reverse, identifying and more harshly punishing particular acts from among the many instances of the same type of unlawful conduct *because of its expressive motivation.* That a speech purpose can be the reason for an enhanced penalty in a certain, identifiable class of cases should prompt free speech clause scrutiny of the enhancement in these applications.

Part II describes the current state of the law under which penalty enhancements atop civil disobedience presumptively pose no free speech clause problem. Part II.A describes and diagrams the Court's current free speech clause model. Part II.B places civil disobedience within it. Part II.C explains the judicial analysis of penalty enhancements that flows from the current free speech model. This section also details the Court's recent analysis of a hate crime enhancement and demonstrates how its reasoning has been applied by lower courts to find other types of penalty enhancements—the federalizing enhancement of FACE and RICO, and state law punitive damages awards—to satisfy the free speech clause guarantee, even as applied to political protests.

Part III describes and diagrams a clarified free speech model under which civil disobedience is recognized as socially valuable expression and under which penalty enhancements added to such activities receive the scrutiny that the free speech clause's spirit requires. Part III.A identifies three ambiguous points in the current free speech clause model and proposes analytically coherent clarifications that create a clarified free speech clause model. Parts III.B and III.C, respectively, locate civil disobedience and penalty enhancements within this clarified model.

Part IV explains how penalty enhancements apply to civil disobedience under the clarified free speech clause model. Part IV.A argues that numerous factors in the constitutional balance presumptively protect civil disobedience from penalty enhancement. Nevertheless, a government showing that the expressive act at issue indeed results in special noncommunicative harms, distinguishing it from the base acts of lawbreaking that lack the enhancement trigger, or that a strong interest in uniform enforcement of the enhancement may justify it in a particular application. Part IV.B balances civil disobedience's expressive value with the government's interest in the context of the various types of penalty enhancements discussed in the Article.

II. CIVIL DISOBEDIENCE AND PENALTY ENHANCEMENTS WITHIN THE CURRENT FREE SPEECH CLAUSE MODEL

A. *The Current Free Speech Model*

Constitutional theory divides the realm of potentially protected "speech" under the free speech clause of the First Amendment into two fundamental categories. The first category, speech or pure speech,[52] covers expression through words, either verbally or in writing;[53] it also covers activities that in many manifestations are means of communication, even though that is not always their purpose.[54] The line between speech and conduct has evolved over the years, mostly by means of pronouncement.[55] Its exact boundaries continue to be "sometimes hazy."[56]

The other broad category, conduct, breaks down into two subcategories, expressive conduct and nonexpressive conduct.[57] To be expressive, conduct must at least be intended to communicate a message.[58] But this alone is not

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[52] The Court tends to use these terms interchangeably. *Compare* Procunier v. Martinez, 416 U.S. 396, 411 (1974) (describing O'Brien's draft card burning as involving "'conduct' rather than pure 'speech'") *with* United States v. O'Brien, 391 U.S. 367, 376 (1968) (distinguishing "speech" and "conduct").

[53] *See* GERALD GUNTHER, INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW 957–58 (5th ed. 1991); *see also* Texas v. Johnson, 491 U.S. 397, 404 (1989) (assuming that the First Amendment "speech" protection extends to the "spoken or written word").

[54] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 829–30 (2d ed. 1988) (listing these activities as "outdoor distribution of leaflets or pamphlets; door-to-door political canvassing; solicitation of contributions, wherever it takes place; mailbox-stuffing; picketing; civil rights demonstrations and boycotts; communicating with government; putting up outdoor posters or signs").

[55] *Compare* Cox v. Louisiana, 379 U.S. 559, 563–64 (1965) (Protest demonstration is conduct.) *with* Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (Protest demonstration is a "pristine and classic form" of free speech activity.); *compare O'Brien*, 391 U.S. at 376 (stating that draft card burning is conduct) *with* Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 505 (1969) (wearing black armbands to protest the Vietnam War is "closely akin to pure speech").

[56] Brown v. Hartlage, 456 U.S. 45, 55 (1982); *see also* TRIBE, *supra* note 54, at 827 ("[T]he Supreme Court has never articulated a basis for its distinction; it could not do so, with the result that any particular course of conduct may be hung almost randomly on the 'speech' peg or the 'conduct' peg as one sees fit.").

[57] *See* Arcara v. Cloud Books, Inc., 478 U.S. 697, 703, 705 (1986) (distinguishing cases "involving governmental regulation of conduct that has an expressive element" from activities that "manifest[ ] absolutely no element of protected expression").

[58] *See* Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam) (requiring as the first prong of its two-prong test for symbolic conduct that there be "[a]n intent to convey a

sufficient.[59] The message must be reasonably likely to be understood by an audience.[60] Nude dancing in a private club, when claimed by its performers and audience to convey a message, may be expressive conduct, although "only marginally so."[61] Physical assault, however, cannot "by any stretch of the imagination" be constitutionally protected expressive conduct despite the fact that its perpetrator may intend to convey a message that an audience might reasonably understand.[62] Thus, like the boundary between speech and conduct, the line between expressive and nonexpressive conduct remains murky.

Free speech clause analysis differs according to the category of activity affected by government action. Government restriction of speech activities[63] generally triggers more rigorous scrutiny than government restriction of conduct.[64] The exception is when the government, although ostensibly regulating conduct, targets its expressive element.[65] This governmental purpose

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particularized message").

[59] *See O'Brien*, 391 U.S. at 376 ("We cannot accept the view that an apparently limitless variety of conduct can be labeled as 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

[60] *See Spence*, 418 U.S. at 410–11 (requiring as the second in its two-prong test for symbolic conduct a likelihood "that the message would be understood by those who viewed it").

[61] Barnes v. Glen Theater, Inc., 501 U.S. 560, 566 (1991).

[62] *See* Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993).

[63] Government restriction of individual speech must be distinguished from speech by the government, either through its figureheads or through funding of expression, which, because it does not "abridge [individual's] freedom of speech," does not invoke free speech clause review. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) ("[W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."); Rust v. Sullivan, 500 U.S. 173, 193 (1991). In *Rust*, the Supreme Court stated that:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

Id.

[64] *See* Texas v. Johnson, 491 U.S. 397, 406 (1989) ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.").

[65] *See id.* (noting that the government may not "proscribe particular conduct *because* it has expressive elements"); United States v. O'Brien, 391 U.S. 367, 377 (1968) (applying its lenient balancing test to a government regulation that incidentally restricts expressive conduct

to restrict expression invokes the more rigorous "speech" analysis in the constitutional framework.[66]

According to the Court's articulations, even when the government does not target its expressive element, there is a difference between the analysis of expressive and nonexpressive conduct.[67] In fact, the Court has claimed to apply the same balancing test to government actions that restrict expressive conduct as it does to government actions that restrict the time, place, or manner of speech activities without respect to their content.[68] In application, however, there is a real difference between the balancing test used for content neutral speech restrictions and restrictions of expressive conduct, but there is no real difference between the analysis of expressive and nonexpressive conduct restrictions.[69]

Where conduct is deemed expressive, three prongs remain in the articulated test: whether the action is within the government's power, whether the action serves an important or substantial governmental purpose, and whether the incidental restriction of speech is no greater than necessary to serve the

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when "the governmental interest is unrelated to the suppression of free expression"); Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1176, 1202 (1996) (noting that the requirement that a government regulation of conduct be unrelated to the suppression of free expression is "a precondition for the application of the test in the first instance").

[66] *See, e.g.*, United States v. Eichman, 496 U.S. 310, 317–18 (1990) (observing that because the Flag Protection Act of 1989 "suffer[ed] from the . . . fundamental flaw [of] suppress[ing] expression out of concern for its likely communicative impact . . . [it] must be subjected to 'the most exacting scrutiny'" (quoting Boos v. Barry, 485 U.S. 312, 321 (1988))).

[67] If conduct is nonexpressive, it is not "speech" and therefore does not trigger free speech clause analysis. *See Mitchell*, 508 U.S. at 484–86 (implying that because a physical assault cannot be expressive conduct, a penalty for that act alone would not trigger free speech clause analysis). If conduct is at least presumptively expressive, the Court purports to balance the government's interest in regulating the conduct against the "incidental restriction on alleged First Amendment freedoms." *O'Brien*, 391 U.S. at 377.

[68] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) ("[T]he [*O'Brien*] test 'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.'" (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984))).

[69] *See, e.g.*, Ely, *supra* note 3, at 1488–89 (distinguishing between "serious balancing" that occurs when a content neutral law restricts "relatively familiar" means of expression, which the Court categorizes as speech, from the highly deferential standard that applies to activities that the Court categorizes as expressive conduct); Keith Werhan, *The* O'Briening *of Free Speech Methodology*, 19 ARIZ. ST. L.J. 635, 641 (1987) (noting that the expressive conduct analysis offers "little more than the minimal rational-basis test applied in economic due process cases").

government's purpose.[70] The first prong is implicit in any constitutional inquiry.[71] And, although the second and the third prong sound more demanding than the rational basis standard, which requires only a legitimate government purpose and a reasonable means/end fit, in the Court's application they are not.[72] The judicial inquiry as to purpose does not extend beyond its legitimacy.[73] Once the legitimacy of a conduct-directed purpose is established, the means, unless perversely chosen without regard to their end, will undoubtedly be reasonably tailored to serve it.[74] This final conclusion then justifies the restriction of expression that, because the government action is not

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[70] *See O'Brien*, 391 U.S. at 377.

[71] *See* Dorf, *supra* note 65, at 1202 ("Prong one [of the expressive conduct test] is not properly part of First Amendment law, because *all* regulation must be within the government's constitutional power.").

[72] *See, e.g., id.* at 1204 (noting that the expressive conduct test formally resembles conventional intermediate scrutiny, but is, in actuality, "toothless"); Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 WM. & MARY L. REV. 779, 787–88 (1985) (same); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 52 (1987) (same). *But see* STEVEN SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE 29 n.97, 33 n.122 (1990) (arguing that the *O'Brien* test has bite as applied by the lower federal courts).

[73] *See, e.g.*, Dean Alfange, Jr., *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 1–52 ("The Court's use of 'substantial,' therefore, [with respect to the government interest] is more appropriate if the term is understood in its sense of 'having substance' or 'not imaginary,' rather than the sense of 'considerable' or 'large.'"). In its most recent expressive conduct case, the Court held that despite its incidental restriction of any expressive element in totally nude dancing, "the public indecency statute furthers a substantial government interest in protecting order and morality." Barnes v. Glen Theater, Inc., 501 U.S. 560, 569 (1991). In support of this conclusion, it recited the long history of public indecency statutes and quoted from several cases dealing with the legitimacy, rather than the substantiality, of morals legislation. *See id.* (discussing Paris Adult Theater I v. Slaton, 413 U.S. 49, 61 (1973) ("[A] legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.'") and Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (reviewing the state's justification for its anti-sodomy law under a rational basis standard)). Thus, although the Court clings to the word "substantial," which purports to elevate the *O'Brien* standard from mere rationality review, its results remain consistent: A rational conduct-directed government purpose will justify incidental restriction of purportedly expressive conduct.

[74] *See, e.g.*, Ely, *supra* note 3, at 1484–85 (noting that the expressive conduct test's tailoring prong requires only "that there be no less restrictive alternative capable of serving the state's interest *as efficiently as it is served by the regulation under attack*"). Once the government's speech-directed motive is removed from the inquiry and an alternate, conduct-directed purpose established, the question boils down to whether the government has chosen reasonable means to address the conduct. Almost always, the government will be found to have done so because addressing the conduct was its purpose.

targeted at expression, is only "incidental."[75] Thus, once it is determined that a government regulation of conduct is not directed at expression, whether the conduct is expressive or nonexpressive does not significantly affect the analysis. The inquiry in both instances approximates the deferential rational basis standard.

Along the speech route, the relevant question is whether the government action is directed at the content of the message.[76] If so, strict scrutiny applies,[77] unless the government is regulating speech on its own property that it has not opened for expression[78] or unless the content of the speech falls within one of the categories that the Court had determined to be entirely unprotected,[79] or less protected than most speech.[80] The government may entirely suppress unprotected speech[81] and may suppress less protected speech subject to a less

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[75] *See generally* Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 933–45 (1993) (discussing incidental burdens on speech); Dorf, *supra* note 65, at 1200–10 (same); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 722–28 (1991) (same).

[76] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[77] *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 198 (1992) ("As a facially content-based restriction on political speech in a public forum, [a Tennessee law creating a 100-foot solicitation-free zone around polling places] must be subjected to exacting scrutiny . . . ."); *R.A.V.*, 505 U.S. at 395 ("[T]he 'danger of censorship' presented by a facially content-based statute requires that the weapon be employed only where it is '*necessary* to serve [an] asserted [compelling] interest.'" (quoting Burson v. Freeman, 504 U.S. 191, 199 (1992) (plurality opinion))).

[78] *See* Perry Educators' Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (distinguishing between quintessential public forums and limited public forums, to which strict scrutiny review of content discriminations apply, and nonpublic forums, which the government "may reserve . . . for its intended purposes, communicative or otherwise, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view").

[79] These categories include speech that incites imminent lawless action, *see* Brandenburg v. Ohio, 395 U.S. 444 (1969), fighting words, *see* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), libel, *see* New York Times, Co. v. Sullivan, 376 U.S. 254 (1964), and obscenity, *see* Miller v. California, 413 U.S. 15 (1973).

[80] These categories include sexually explicit speech, *see* FCC v. Pacifica Found., 438 U.S. 726 (1978); Young v. American Mini-Theaters, 427 U.S. 50 (1976), and commercial speech, *see* Central Hudson Gas v. Public Serv. Comm'n of New York, 447 U.S. 557 (1980).

[81] *See R.A.V.*, 505 U.S. at 383 (clarifying that content discriminations beyond the "distinctively proscribable content" that defines the class of unprotected speech invoke free speech clause scrutiny); *Chaplinsky*, 315 U.S. at 571–72 ("There are certain well-defined and

rigorous balancing inquiry[82] because the Court has determined that the particular type of speech within these limited categories is of lesser social value than fully protected speech.[83]

Only a compelling interest and means narrowly tailored to meet it will justify a content-based regulation of protected speech.[84] Almost every government action will fail this demanding test.[85] Where a government action is content-neutral, regulating the time, place, or manner of speech rather than its message, the analysis is a balancing test[86] that weighs the legitimacy and importance of the government interest,[87] the availability and adequacy of alternate means for the government to promote the interest,[88] the speech-reducing impact of the government action,[89] the availability and adequacy of alternate means of speech,[90] traditions associated with the place of

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narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.").

[82] *See, e.g.*, *Central Hudson*, 447 U.S. at 569–70 ("'The critical inquiry' is whether the Commission's complete suppression of [commercial] speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State's interest.").

[83] *See R.A.V.*, 505 U.S. at 383 ("[T]hese areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* . . . ."); *Chaplinsky*, 315 U.S. at 572 (stating that such expression is "of such slight social value as a step to truth than any benefit that may be derived from them is clearly outweighed by the social interest in order and morality").

[84] *See* Boos v. Barry, 485 U.S. 312, 321 (1988).

[85] *See R.A.V.*, 505 U.S. at 382 (holding that "content-based restrictions are presumptively invalid"). *But see* Burson v. Freeman, 504 U.S. 191, 211 (1992) (upholding a state law 100-foot no-solicitation zone around polling places under the strict scrutiny standard).

[86] *See* Metromedia, Inc. v. San Diego, 453 U.S. 490, 526–27 (1981) (Brennan, J., concurring) (assuming that an ordinance banning almost all outdoor billboards is content-neutral, it is still necessary "to assess the 'substantiality of the governmental interests asserted' and 'whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment . . . .'" (quoting Schad v. Mt. Ephram, 452 U.S. 61, 70 (1981); Martin v. City of Struthers, 319 U.S. 141, 143–49 (1943))).

[87] *See, e.g.*, Schneider v. State, 308 U.S. 147, 161 (1939) (noting the need "to appraise the substantiality of the reasons advanced in support of the regulation").

[88] *See id.* at 162 ("There are obvious methods of preventing littering [other than prohibiting the distribution of leaflets]."); *Martin*, 319 U.S. at 146–48 (noting that rather than prohibiting any door-to-door solicitation for the purpose of [distributing] handbills, "the city [c]ould make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed").

[89] *See* City of Ladue v. Gilleo, 512 U.S. 43, 54 (1994) ("Ladue has almost completely foreclosed a venerable means of communication that is both unique and important.").

[90] *See id.* at 56 (noting that "even regulations [of] time, place, or manner [must] 'leave

expression—has it traditionally been open for public communications?[91]—and the affect of the regulation on discrete groups—does the restriction disproportionately silence speakers without the means to pay for more expensive modes of communication?[92] Government actions fall on either side of this test with reasonable frequency.[93] Diagram A graphically portrays the current free speech clause model.

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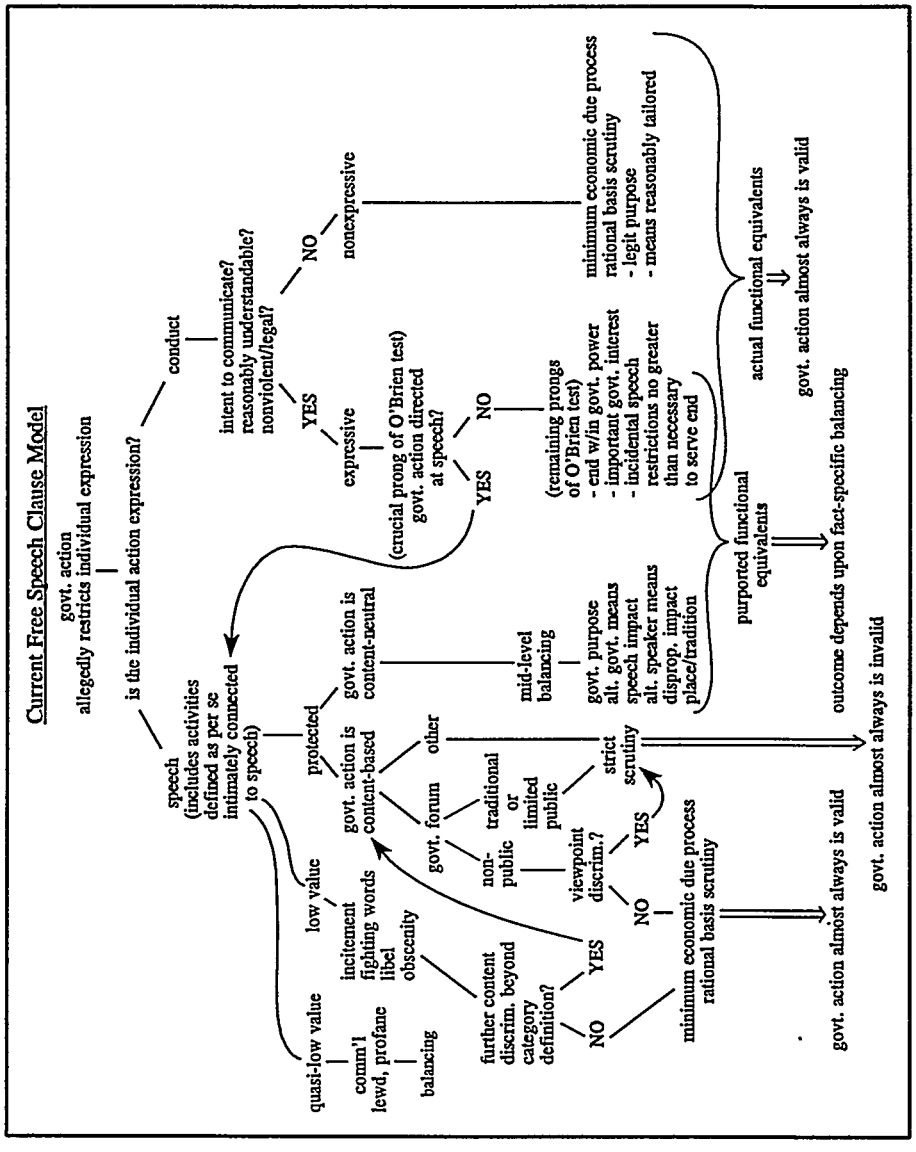
open ample alternative channels for communication'" (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984))); *Metromedia*, 453 U.S. at 562–63 (Burger, J., dissenting) ("The messages conveyed on San Diego billboards [can] . . . reach an equally large audience through a variety of other media . . . ."); Kovacs v. Coopers, 336 U.S. 77, 89 (1949) (noting that the anti-noise ordinance at issue did not "restrict the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers").

[91] *See City of Ladue*, 512 U.S. at 58 ("A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to speak there."); *Kovacs*, 336 U.S. at 87 ("City streets are recognized as a normal place for the exchange of ideas . . . ."); Hague v. C.I.O., 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

[92] *See City of Ladue*, 512 U.S. at 57 (Residential signs "are an unusually cheap and convenient form of communication."); *Martin*, 319 U.S. at 146 (Door-to-door solicitation "is essential to the poorly financed causes of little people.").

[93] *See City of Ladue*, 512 U.S. at 58–59 (invalidating residential no-sign); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 776 (1994) (upholding and invalidating parts of an injunction against anti-abortion protesters under an elevated time, place, and manner standard); Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (upholding anti-noise ordinance); *Metromedia*, 453 U.S. at 517–21 (invalidating no-billboard ordinance).

Diagram A


Current Free Speech Clause Model
govt. action
allegedly restricts individual expression
is the individual action expression?
conduct
intent to communicate?
reasonably understandable?
nonviolent/legal?
YES
NO
nonexpressive
minimum economic due process
rational basis scrutiny
- legit purpose
- means reasonably tailored
expressive
(crucial prong of O'Brien test)
govt. action directed
at speech?
YES
NO
(remaining prongs
of O'Brien test)
- end w/in govt. power
- important govt. interest
- incidental speech
restrictions no greater
than necessary
to serve end
purported functional
equivalents
actual functional equivalents
govt. action almost always is valid
speech
(includes activities
defined as per se
intimately connected
to speech)
protected
govt. action is
content-neutral
mid-level
balancing
govt. purpose
alt. govt. means
speech impact
alt. speaker means
disprop. impact
place/tradition
govt. action is
content-based
other
strict
scrutiny
govt. forum
traditional
or
limited
public
non-
public
viewpoint
discrim.?
YES
NO
quasi-low value
comm'l
lewd, profane
balancing
low value
incitement
fighting words
libel
obscenity
further content
discrim. beyond
category
definition?
YES
NO
minimum economic due process
rational basis scrutiny
govt. action almost always is valid
outcome depends upon fact-specific balancing
govt. action almost always is invalid

B. *The Place of Civil Disobedience in the Current Free Speech Model*

Civil disobedience is expression conveyed through the means of breaking the law.[94] Although words may be part of civil disobedience, its most fundamental message is the symbolic statement that comes from deliberately illegal action.[95] Thus, according to the Court's speech/conduct dichotomy, lawbreaking is conduct.[96]

Exactly how the Court's analysis would proceed after this initial categorization is less clear. Under its two-pronged test that looks to speaker intent and audience perception,[97] civil disobedience should, by definition, be expressive conduct.[98] The Court's recent implication that physical assault cannot be expressive conduct,[99] however, casts doubt on this conclusion because it could be read to lump "other types of potentially expressive activities that produce special harms distinct from their communicative impact"[100] into this conclusion—specifically, all acts that break a nonspeech-directed law.[101] Thus perhaps civil disobedience would be classified as per se nonexpressive

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[94] *See, e.g.*, RAWLS, *supra* note 11, at 366 ("One may compare [civil disobedience] to public speech . . . ."); Ernest van den Hagg, *Disobedience and the Law*, 21 RUTGERS L. REV. 27, 27 (1966) ("[C]ivil disobedience [occurs] when a law is deliberately disobeyed to publicly demonstrate opposition, on moral grounds, to laws or policies of the government.").

[95] *See* Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of "Speech"*, 1993 WIS. L. REV. 1525, 1586 (differentiating "ordinary violations of law" from "disobedience [that is] communicative").

[96] *See* United States v. O'Brien, 391 U.S. 367, 382 (1968) (analyzing draft card burning as conduct).

[97] *See* Spence v. Washington, 418 U.S. 405, 408–15 (1974).

[98] *See, e.g.*, Morris Keeton, *The Morality of Civil Disobedience*, 43 TEX. L. REV. 507, 508 (1965) ("[The] act of civil disobedience [is] . . . an act of deliberate and open violation of law with the intent, within the framework of the prevailing form of government, to protest a wrong or to accomplish some betterment in the society.").

[99] *See* Wisconsin v. Mitchell, 508 U.S. 476, 483 (1993).

[100] *Id.* at 484 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984)).

[101] Like the Supreme Court, lower courts seem often to merge the expressive/nonexpressive and protected/unprotected categorizations. *See, e.g.*, National Org. for Women v. Scheidler, 968 F.2d 612, 616 (7th Cir. 1992) ("Although the defendants' acts generated publicity which they may have hoped would influence governmental actors, this tangential contact is not sufficient to invoke First Amendment protection for otherwise criminal behavior."). Although concurring in the reversal of the decision on appeal, Justices Souter and Kennedy echoed the theme that illegal action is outside the First Amendment without distinguishing between the expressive/nonexpressive and protected/unprotected categorizations. *See* National Org. for Women v. Scheidler, 510 U.S. 249, 264 (1994) (repeatedly stating that the application of RICO to acts of political protest would pose a constitutional problem if it chilled "fully protected" activity).

conduct because it produces the noncommunicative harms that stem from the functional act of breaking the law,[102] and the free speech clause inquiry would be over.[103]

But under the current free speech model, the distinction between expressive and nonexpressive conduct does not really matter. Even if the Court was willing to view civil disobedience as expressive conduct, free speech clause analysis would terminate almost as quickly.[104] As noted above, the only question that triggers any substantial level of analysis of conduct-directed government action is whether that action is directed at the speech component of the impacted conduct.[105] If so, the government's action becomes highly suspect. If not, judicial deference kicks in—the action is valid according to an inquiry that is the functional equivalent to rational basis scrutiny.[106]

This expressive conduct model leaves no place to consider or weigh the value of the speech lost when the government prohibits civilly disobedient lawbreaking.[107] Only a government speech-directed motive prompts substantial analysis. The civil disobedient's protest, however, is not that the law broken is unconstitutionally speech-directed. To the contrary, it is most often a nonspeech-directed government action that the civil disobedient protests. A motivating reason for the protest may well be the precision of fit between the government's ends and means and the law's effectiveness in bringing about its intended nonspeech-related result. Moreover, the means of lawbreaking is often

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[102] Even trespassory protests that result in no property damage invade property rights, which is a distinct, noncommunicative harm.

> The interest in exclusive possession of land is distinct from the interests in physical integrity and actual enjoyment of the land. . . . The rightful possessor may insist that others not enter the land even if the possessor is not physically present on the land, is not using it, and is not harmed in any tangible way by another's entry or use.

DAN B. DOBBS, LAW OF REMEDIES 786–87 (2d ed. 1993).

[103] *See* Arcara v. Cloud Books, Inc., 478 U.S. 697, 707 (1986) (noting that free speech clause analysis does not apply "to a statute directed at imposing sanctions on nonexpressive activity"). The minimum economic due process rational basis scrutiny would remain, as it does for any government action.

[104] This perhaps explains why the Court so carelessly lumped the expressive/nonexpressive and the protected/unprotected categorizations together in *Mitchell*—careful analysis of the first question did not matter because the conclusion that the conduct was ultimately unprotected was so clear.

[105] *See supra* notes 65–66 and accompanying text.

[106] *See* discussion *supra* Part II.A.

[107] *See, e.g.*, Werhan, *supra* note 69, at 641 ("There is no speech side to the Court's balance.").

a concession that current legal limits on the scope of government power are insufficient to constrain it in the way the civil disobedient believes appropriate.[108] Thus, the same factors that motivate the civil disobedient's protest are what validate the government action in the current free speech clause analysis.

C. *The Place of Various Types of Penalty Enhancements Within the Current Free Speech Clause Model*

Several broad principles from the current free speech model guide judicial analysis of penalty enhancement provisions. The first is that judicial scrutiny under the free speech clause is appropriate only if the government action genuinely impacts expression. Under the speech/conduct dichotomy, penalty enhancement provisions apply to base conduct that breaks a preexisting law. In most instances, such lawbreaking is not expression. Rather, it is individually and socially harmful activity engaged in for nonspeech-related reasons that the government has the right and responsibility to punish and deter. Thus, in most applications, penalty enhancements work upon base acts of lawbreaking that have neither the purpose nor the effect of suppressing expression.

A second principle from the current free speech model that guides judicial analysis of penalty enhancements is that a governmental intent to suppress expression is the most fundamental constitutional evil.[109] Thus, even when an act of lawbreaking is allegedly expression, if, as will almost always be the case, its definition is expression-neutral, government intent to suppress expression will be lacking.[110] According to the current free speech model, all that will remain is the far lesser evil of an unintended impact on expression.[111]

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[108] *See, e.g.*, Gene Warner, *Activists Will Take Case to Public with Lecture About Government Abuse, Civil Disobedience*, BUFFALO NEWS, Mar. 23, 1997, at 6B (Civil disobedience advocates lecture on the topic "When the law is wrong, when the government is a bully, what can you do?").

[109] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989) ("The principal inquiry . . . in speech cases . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."); *see also* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 413–517 (1996) (arguing "that First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives").

[110] *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.").

[111] *See, e.g.*, Madsen v. Women's Health Ctr., 512 U.S. 753, 763 (1994) ("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the

Moreover, because the base act is illegal for nonspeech-related reasons, it presumptively results in nonspeech-related harms that the government may lawfully prohibit. Under the current free speech clause model, these legitimate governmental objectives fulfilled by defining certain acts as unlawful outweigh any alleged impact on expression resulting from those definitions.

The third important analytical principle from the current free speech clause model is that the breadth of scope of a penalty enhancement provision helps insulate it from constitutional challenge.[112] Although a broad penalty enhancement provision may suppress more potentially expressive actions than a more narrow one, its breadth provides the crucial guarantee that the government did not purposely target particular viewpoints for suppression.[113]

Both these principles and the facts to which penalty enhancements are usually applied combine to form a strong judicial presumption that particular penalty enhancements are consistent with the Constitution's free speech guarantee.

1. *Hate Crime Penalty Enhancement Statutes*

The Court recently reviewed the quintessential penalty enhancement—a legislative decision to augment the punishment for certain acts when the perpetrator commits them for a particular reason. The state statute at issue in *Wisconsin v. Mitchell*[114] provided for greater penalties for a range of previously defined crimes[115] when the actor "intentionally selects" his victim "because of"

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injunction content or viewpoint based.").

[112] *See, e.g.*, James Weinstein, *Hate Crime and Punishment: A Comment on* Wisconsin v. Mitchell, 73 OR. L. REV. 345, 363–64 (1994) (distinguishing an enhancement "that expressly refers to the defendant's views on abortion, a highly charged political issue" or one "that expressly referred to crimes committed in opposition to the United States' military's reprisals against Iraq" from "the Wisconsin law at issue in *Mitchell*" that "does not refer to political ideology, but rather to selection of the victim on the basis of race, religion, or other protected status" and therefore may include those who act from other than racist motives).

[113] *See* City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) ("[A]n exemption from an otherwise permissible regulation of speech may represent a government 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" (quoting First Nat. Bank of Boston v. Belloti, 435 U.S. 765, 785–86 (1978))); Carey v. Brown, 447 U.S. 455, 459–71 (1980) (asserting that regulatory distinctions between different kinds of speech may violate the Equal Protection Clause); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 98–102 (1972) (same).

[114] 508 U.S. 476 (1993).

[115] These crimes range from low level misdemeanors such as trespass, for which the maximum penalty increases to a fine of $10,000 and imprisonment of up to one year, to felonies, for which the maximum fine may be increased by up to $5000 and the maximum length of imprisonment increased by up to five years. *See* WIS. STAT. § 939.645 (1989–

certain physical characteristics, including race.[116] Under the Wisconsin statute, motive translates into enhanced punishment.

The United States Supreme Court upheld the statute against a claim that the motive-based enhancement unconstitutionally penalized free expression.[117] First, the Court noted in an ambiguous conflation of two constitutional concepts[118] that the base act of assault to which the penalty enhancement attached was not "expressive conduct protected by the First Amendment."[119] It then severed the enhancement from the unprotected base act for constitutional analysis,[120] noting that the state supreme court had found its motive trigger to unconstitutionally punish "offenders' bigoted beliefs."[121]

In rejecting the state supreme court's analysis, the Court's reasoning evidences the general principles of the current free speech clause model. The Court relied upon the speech/conduct distinction in several ways. First, the Court found a constitutionally relevant difference between a criminal defendant's abstract beliefs, which the government may not punish,[122] and motive connected to unlawful action.[123] Motive is relevant to judges in setting

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1990).

[116] More fully, the Wisconsin penalty enhancement statute increases the punishment whenever the defendant "[i]ntentionally selects the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the . . . race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property." WIS. STAT. § 939.645 (1989-1990), *cited in Mitchell*, 508 U.S. at 480.

[117] The Wisconsin Supreme Court had accepted this argument. *See* State v. Mitchell, 485 N.W.2d 807, 811 (Wis. 1992) (stating that the statute "violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought").

[118] *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 89-91 (1982) (emphasizing the difference between constitutional coverage and protection); Tiersma, *supra* note 95, at 1528 ("If conduct is covered by the First Amendment, it comes within its scope and at least some constitutional scrutiny is called for. Once conduct is covered, however, the courts must still determine the level of protection it will receive." (citing SCHAUER, *supra*, at 89-91)).

[119] *Mitchell*, 508 U.S. at 484.

[120] *Id.* at 485 ("[A]lthough the statute punishes criminal conduct, it enhances the maximum penalty for conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason or for no reason at all.").

[121] *Id.*

[122] *See id.* ("[A] defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge." (citing Dawson v. Delaware, 503 U.S. 159 (1992))).

[123] *See id.* at 486 (distinguishing evidence of group membership that "proved nothing more than . . . abstract beliefs" from the same evidence when it showed "racial animus toward the victim" and was therefore "related to" the crime).

the level of punishment for an offense because some reasons for acting are "good" and others "bad."[124] Moreover, motive may be a proxy for purposeful lawbreaking, which according to "[d]eeply ingrained . . . legal tradition" ought to be more severely punished.[125] The Court noted that motive plays the same role in the penalty enhancement statute as it does in state and federal anti-discrimination statutes: In both instances motive correlates to the "reason . . . for acting,"[126] a legitimate basis for distinguishing between the same functional conduct.

Second, the Court distinguished its previous decision invalidating a local hate crime ordinance as unconstitutionally message-directed and content-based,[127] which had formed the basis for the state supreme court's holding.[128] While the invalid ordinance "was explicitly directed at expression," the penalty enhancement statute was "aimed at conduct unprotected by the First Amendment."[129]

Third, the Court credited the state's assertion that racially motivated crimes are likely to "inflict greater individual and social harm" than the same conduct engaged in based upon other motivations.[130] These harms and the State's desire to redress them "provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or

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[124] *Id.* at 485 ("[I]t is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives, or a rather high sentence because of his bad motives." (quoting 1 W. LEFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 3.6(b), at 324 (1986))).

[125] *Id.* (quoting Tison v. Arizona, 481 U.S. 137, 156 (1987)).

[126] *Id.* at 487.

[127] *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[128] *See* State v. Mitchell, 485 N.W.2d 807, 815 (Wis. 1992) (relying upon *R.A.V.* to characterize the Wisconsin statute as "criminaliz[ing] bigoted thought with which [the legislature] disagrees").

[129] *Mitchell*, 508 U.S. at 487 (citing *R.A.V.*, 505 U.S. 377). The St. Paul ordinance prohibited the display of a symbol that one knows or has reason to know "arouses anger, alarm or resentment in others" on the basis of certain, specified characteristics, including race. The defendant in that case had placed a burning cross on an African American family's lawn. The Court assumed that the ordinance applied only to "fighting words," which, as a constitutionally unprotected category of speech, the city could proscribe entirely. However, because St. Paul proscribed only a subset of fighting words based upon the content of their message, the Court invalidated the ordinance. *See R.A.V.*, 505 U.S. at 391 ("The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.").

[130] *Mitchell*, 508 U.S. at 488 ("[B]ias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.").

biases."[131] This reason translates into an assurance that the penalty enhancement comports with what the current model deems the crux of the free speech guarantee—that the government not act with a speech-suppressing motive.

These reasons end the Court's analysis. However, another of the current model's broad principles implicitly underlies its result. Most likely the Court did not perceive the Wisconsin statute to discriminate between political points of view.[132] Although undoubtedly aimed to prevent hate crimes, the penalty enhancement was broad enough to encompass crimes motivated by other than "bigoted thought."[133] As with the existence of special harms that flow from the motivation, the breadth of motive under the current model provides an important guarantee that the government is not engaging in purposeful, viewpoint discriminatory action.

Beyond theory, the facts before the *Mitchell* Court most likely contributed to its broad pronouncements. The defendant in that case was convicted of the base crime of aggravated battery[134] for inciting a group of African American friends to attack a young boy because he was white. Aggravated battery is a crime because it produces significant individual and social harms. Physical assault is not normally a means of expression, nor was it a means of expression in this particular case. Moreover, even if it is a means of expression in a particular instance, the governmental interest in preventing the resulting harms would outweigh the free speech right. Thus, there was nothing about the particular base activity that would render it constitutionally protected in that case or in any conceivable manifestation. Moreover, the motive that led to the penalty enhancement—targeting the victim because of his race—plausibly showed purposefulness of action, which is a traditional reason for enhancing punishment, as well as the possibility of greater social harms than physical

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[131] *Id.*

[132] *See, e.g.*, Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests*, 29 U.C. DAVIS L. REV. 553, 631 (1996) ("It is hard to believe that the Court would uphold a [viewpoint discriminatory penalty enhancement, although] . . . the reasoning of *Mitchell* technically leaves this issue open . . . .").

[133] *See, e.g.*, *id.* at 630 ("[T]he law in *Mitchell* . . . would seem to involve content discrimination not viewpoint discrimination, to the extent that it involves discrimination related to expression at all."); Weinstein, *supra* note 112, at 364 ("Far from referring to any identifiable political or social ideology, such as white separatism or black nationalism, the Wisconsin statute does not even require that the defendant act with a *racist* motive. Racial motive will suffice.").

[134] *Mitchell*, 508 U.S. at 480 (citing WIS. STAT. §§ 939.05 & 940.19(1m) (1989–1990)).

assaults motivated by other reasons.[135] Quite simply, where a group of men and teenagers beat a young boy unconscious out of racial hatred, neither the base act nor the penalty enhancement justify free speech clause protection.

2. *Federalizing Statutes*

a. *Target-Specific Enhancement: The Free Access to Clinic Entrances Act*

Like the Wisconsin penalty enhancement statute, the Freedom of Access to Clinic Entrances Act (FACE) augments the punishment for certain conduct because of the actor's motive. FACE prohibits the use of "force or threat of force" or "physical obstruction" that "*intentionally* injures, intimidates, or interferes . . . with any person *because* that person . . . has been . . . obtaining or providing reproductive health services."[136] FACE's penalties for the targeted conduct that falls within its provisions are generally more severe than existing state law penalties.[137] In fact, enhancing the penalties was the purpose for federalizing the class of state law crimes.[138]

The lower courts that have reviewed FACE have found its penalty enhancements valid according to the general principles that underlie the current free speech clause model.[139] Most crucially, in the courts' perceptions, the

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[135] The facts of the case well illustrate at least one of the additional social harms alleged to flow from race-targeted actions—provoking retaliatory action, as the assault itself seems to have been in "retaliation" for the race-based assault depicted in the film, *Mississippi Burning*. *See id.*

[136] 18 U.S.C. § 248(a)(1) (1994) (emphasis added). Despite its name, a late amendment protects access to places of religious worship in the same ways. *See id.* § 248(a)(2).

[137] FACE generally authorizes fines of $15,000 or one-year jail terms, or both, for first violations and $25,000 or three-year jail terms, or both, for subsequent violations. If bodily injury results, FACE authorizes imprisonment of up to ten years, and if death results, it authorizes an unlimited term. *See id.* § 248(b). For "nonviolent physical obstruction" the fines are somewhat reduced—$10,000 or six months, or both, for first violations and $25,000 or 18 months, or both, for subsequent violations. *See id.* It also authorizes private civil actions for fees and damages according to proof or in a statutory amount of $5000 per violation. *See id.* § 248(c)(1).

[138] *See* S. REP. NO. 103-117, at 20 (1993) (noting that the "problem with reliance on state and local laws is that the penalties for violations of these laws are often so low as to provide little if any deterrent effect").

[139] *See, e.g.*, Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996); United States v. Soderna, 82 F.3d 1370 (7th Cir. 1996); United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995); Woodall v. Reno, 47 F.3d 656 (4th Cir. 1995); American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir. 1995); Planned Parenthood of Southeastern Pa. v. Walten, 949 F. Supp. 290 (E.D. Pa. 1996); United States

trigger for FACE liability is actions,[140] most of which were already unlawful for nonspeech-based reasons.[141] These actions are not normally means of expression and have "physical consequences that are independent of symbolic significance."[142] These nonspeech-related harms justify the government's initial decision to make the base functional acts unlawful. Thus, like the base state law penalties, the federalizing enhancement applies to constitutionally unprotected conduct.[143] The crucial question then with respect to the additional punishment that the federal law provides is whether it unconstitutionally discriminates as to viewpoint. Here, the reviewing courts have explicitly relied upon the breadth of FACE's motive trigger to uphold its provisions. That FACE's penalty enhancements apply to actions beyond those that prompted its enactment is important evidence that it complies with the free speech guarantee.[144]

By contrast to its theoretical breadth, the facts to which FACE has been applied have largely paralleled those specifically envisioned by its proponents. That is, in most applications, FACE's motive-based enhancements plausibly correlate to knowing violations of individual rights[145] as well as identifying

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v. Lucero, 895 F. Supp. 1421 (D. Kan. 1995); United States v. White, 893 F. Supp. 1423 (C.D. Cal. 1995); United States v. Brock, 863 F. Supp. 851 (E.D. Wis. 1994); Riely v. Reno, 860 F. Supp. 693 (D. Ariz. 1994); Cook v. Reno, 859 F. Supp. 1008 (W.D. La. 1994); Council for Life Coalition v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994).

[140] *See, e.g.*, *Terry*, 101 F.3d at 1418 (FACE "prohibits three types of conduct: use of force, threat of force, and physical obstruction."). *But see* Brownstein, *supra* note 132, at 556-84 (arguing that FACE's threat prohibition impacts pure speech and therefore that the constitutional analysis does not fall squarely within *Mitchell*'s reasoning, proposing an alternate analysis that ultimately reaches the same conclusion as the courts).

[141] FACE criminalizes three types of activities—"force," "threat[s] of force," and "physical obstruction." 18 U.S.C. § 248(a) (1994). Acts of force would already be unlawful under state laws prohibiting acts of violence to persons or property. Threats of force would already be unlawful under various state laws prohibiting intimidation and harassment. Physical obstruction would be unlawful under trespass laws to the extent it interferes with property rights. Perhaps some acts of physical obstruction would not have a state law equivalent.

[142] *Soderna*, 82 F.3d at 1375.

[143] *See Terry*, 101 F.3d at 1418 ("[FACE] does not target protected speech.").

[144] *See, e.g., id.* at 1419 (FACE "would apply to an individual who spray paints the words 'KEEP ABORTION LEGAL' on a facility providing counseling regarding abortion alternatives as well as to the individual who spray paints the words 'DEATH CAMP' on a facility providing abortion services." (quoting *Reily*, 860 F. Supp. at 702)); *Dinwiddie*, 76 F.3d at 923 ("FACE would prohibit striking employees from obstructing access to a clinic in order to stop women from getting abortions, even if the workers were carrying signs that said, 'We are underpaid!' rather than 'Abortion is wrong!'").

[145] *See* Planned Parenthood of Southeastern Pa. v. Walton, 949 F. Supp. 290, 293 (E.D. Pa. 1996) (noting that FACE's stated purpose is "to protect and promote public safety

actions with greater potential for individual and social harm.[146] Moreover, the lower courts reviewing the constitutionality of FACE are armed with its legislative history detailing the acts of sabotage and violence that prompted the statute.[147] Where the facts in their particular cases involve personally directed violence or threats of violence, they parallel the egregious facts cited by Congress. In these contexts, the social value of political protest motivation pales in comparison to the individual and social harm of the actual or threatened violence.[148]

Although "physical obstruction" may be nonviolent in particular manifestations,[149] both the history of violent interference and threatening intimidation with clinic patients and personnel and the frequent tendency of potentially peaceful acts of physical obstruction to include threats and physical contact[150] affect the perceived validity of enhancing the penalty for the entire class of physically obstructive acts. An "enough is enough" attitude pervades a

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and health and activities affected interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services" (quoting Pub. L. No. 103-259, § 2, 108 Stat. 694, 694 (1994))).

[146] *See Dinwiddie*, 76 F.3d at 923 (noting that "[w]hat FACE's motive requirement accomplishes is the perfectly constitutional task of filtering out conduct that Congress believes need not be covered by a federal statute[, namely the] slew of random crimes that might occur in the vicinity of an abortion clinic").

[147] *See* S. REP. NO. 103-117, at 3 (1993) ("From 1977 to April 1993, more than 1,000 acts of violence against abortion providers were reported in the United States. These acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, and one murder.").

[148] *See, e.g.*, *Dinwiddie*, 76 F.3d at 917–18 (Defendant physically assaulted a clinic employee with an electric bullhorn, physically obstructed patients from entering the clinic, and issued threats through the bullhorn, such as "[Y]ou have not seen violence yet until you see what we do to you." She issued over fifty such threats to a clinic doctor. She was "a well-known advocate of the viewpoint that it is appropriate to use lethal force to prevent a doctor from performing abortions." Citing the viewpoint and defendant's conduct, the lower court issued a permanent injunction ordering defendant not to violate FACE, and the appellate court upheld it.).

[149] *See, e.g.*, United States v. Soderna, 82 F.3d 1370, 1373 (7th Cir. 1996) (noting a clinic blockade in which "defendants offered no resistance; there was no violence; there were no threats of violence, or even displays of anger, on the part of the defendants or their supporters, who were picketing in the vicinity").

[150] *See* S. REP. NO. 103-117, at 7 (1993) ("[H]uman barricades often involve pushing, shoving, destruction of equipment and other violent acts as blockaders try to keep patients and staff from entering the clinic.").

number of lower court opinions.[151] The means of obstruction through which a few people create an obstacle less easily removable than the many people who may engage in the conventional sit-in seems also to influence the judicial attitude.[152] Moreover, and especially with reference to peaceful modes of obstruction, courts cite the mixed motivation for the conduct as support for its prohibition: Clinic blockaders often acknowledge that the primary purpose of their conduct is to stop lawful activity, with expression as a dual, and often secondary, objective.[153]

Consequently, both the broad principles that underlie the current free speech model and the facts to which FACE most frequently applies lead to the unbroken string of holdings that its penalty enhancements comply with the Constitution.

b. *Patterned Activity/Concerted Action Enhancement: RICO*

The RICO crime is "participat[ing], directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity."[154] An

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[151] *See, e.g.*, *Soderna*, 82 F.3d at 1376 ("A group cannot obtain constitutional immunity from prosecution by violating a statute more frequently than any other group."); *Dinwiddie*, 76 F.3d at 924 ("[FACE] forbids physical interference with people going about their own lawful business. It is difficult to conceive of any such statute that could not survive this level of scrutiny.").

[152] *See Soderna*, 82 F.3d at 1374 (describing nonviolent clinic blockading by means of welding oneself into vehicles as "distasteful or worse" (quoting United States v. Wilson, 73 F.3d 675, 689 (7th Cir. 1995) (Coffey, J., dissenting))).

[153] *See, e.g.*, S. REP. NO. 103-117, at 11 (1993) ("Anti-abortion activists have made it plain that [their] conduct is part of a deliberate campaign to eliminate access [to abortion] by closing clinics and intimidating doctors."); *Soderna*, 82 F.3d at 1375. The Seventh Circuit stated in *Soderna* that:

> The difference between communication and obstruction was well expressed by one of the defendants in this case when he told the judge, "What we did, we weren't there to protest abortion. If I wanted to protest abortion, I would write my Senator or my congressman. We were there to save innocent human life.

Id. See also Paul R. Davis & William C. Davis, *Civil Disobedience and Abortion Protests: The Case for Amending Criminal Trespass Statutes*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 995, 1010 (1991) (stating that Operation Rescue's founder Randall Terry "indicates the short-term goal of Operation Rescue as stopping as many abortions as a direct result of the 'rescues' as possible, and the long-term goal as being a constitutional amendment prohibiting abortion" (citing *Rescuer of the Unborn*, NEW AMERICAN, Nov. 7, 1988, at 20)).

[154] 18 U.S.C. § 1962 (1994).

"enterprise" can be an individual or a group.[155] A "pattern" requires "at least two" predicate acts of racketeering activity.[156] Racketeering activity is defined as activity that violates any one of multiple listed state and federal criminal acts, including the Hobbs Act.[157] The Hobbs Act criminalizes actual or attempted extortion that affects interstate commerce.[158] "Extortion" is "the obtaining of property from another" through "the wrongful use of actual or threatened force, violence, or fear."[159] Although courts have noted that even "coercive" speech is entitled to constitutional protection,[160] they have found illegal action, such as trespass or destruction of property, to transform protected speech activity into "wrongful" conduct under the Hobbs Act.[161] "Property" has been interpreted to include a broad range of intangible rights, including the right to "make business decisions"[162] and the right "to democratic participation" in a union.[163] In the context of abortion clinic protests in particular, "property" may include both the right to employment at the clinics and the right to obtain services from them.[164] Patterned activity under RICO leads to criminal penalties more severe than the individual criminal acts would warrant under

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[155] *See id.* § 1961(4).

[156] *See id.* § 1961(5).

[157] *See id.* § 1961(1)(B) (listing 18 U.S.C. § 1951 (1994)).

[158] The Hobbs Act states that:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (1994).

[159] *See id.* § 1951(b)(2).

[160] *See, e.g.*, Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1349 (3d Cir. 1989) ("The mere fact, also, that the defendants or some of their protests may be coercive or offensive, does not diminish the First Amendment right to protest.").

[161] *See McMonagle*, 868 F.2d at 1349 ("The jury's award of damages under RICO was based on the destruction of the Center's medical equipment during one of the [four] incidents of forcible entry into the Center. This award establishes that the jury found that Defendants' actions went beyond mere dissent and publication of their political views.").

[162] *See* United States v. Zemek, 634 F.2d 1159, 1174 (9th Cir. 1980); Jakubik v. United States, 585 F.2d 667, 673 (4th Cir. 1978).

[163] United States v. Local 560 of Int'l Bhd. of Teamsters, 780 F.2d 267, 282 (3d Cir. 1985).

[164] *See* National Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 253 & n.2 (1994) (noting that these were the allegations before the lower court, but not reaching the question whether they met the Hobbs Act definitional requirements).

state law or other federal provisions[165] or to civil liability for treble damages.[166]

Like the other penalty enhancements, RICO's pattern trigger fits comfortably as a legitimate reason for enhanced punishment within the current free speech clause model.[167] RICO applies exclusively to conduct already criminalized because of the nonspeech-related individual and social harms that it produces. All of these unlawful activities, including Hobbs Act extortion, usually have selfish ends other than communication.[168] The enhancement depends upon repeated conduct, usually undertaken in concert with others. Like motive, repetition and concerted action are traditional, accepted bases for increasing the level of punishment because they are plausible proxies for culpability and greater individual and social harm.[169]

Moreover, RICO's means-based penalty enhancements, severed from the conduct to which it applies, more easily satisfy the crucial requirement of viewpoint neutrality than do motive-based enhancements. While motive-based penalty enhancements tend to penalize particular beliefs when they form the basis for action, RICO encompasses a wide variety of substantive reasons for acting.[170] Specifically, RICO, with Hobbs Act violations as the predicate acts, broadly penalizes patterned—purposeful, sustained, often concerted—action for the purpose of inducing an individual to give up a wide range of rights.

Moreover, as with the other types of enhancements, the facts of most RICO cases confirm the inference that its penalty enhancements do not usually

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165 Compare the normal state law sanctions for trespass to RICO's heavy penalties.

166 *See* 18 U.S.C. § 1964(c) (1994).

167 Justice Souter, joined by Justice Kennedy, concurred in *Scheidler* "to stress that the Court's opinion does not bar First Amendment challenges to RICO's application in particular cases." *Scheidler*, 510 U.S. at 263. But nothing in the concurrence signaled disagreement with *Mitchell*'s sharp speech/conduct distinction. Rather, the concurrence restated the *Mitchell* dichotomy, distinguishing RICO's appropriate application to "ideological entities whose members commit acts of violence we need not fear chilling" from its unconstitutional application to "entities engaging in vigorous but fully protected expression." *Id.* at 264.

168 RICO is part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified in various sections of 18 U.S.C.). The name explains its initial target. Congress enacted the Hobbs Act to criminalize "the use of robbery and extortion" in labor disputes. *See* 91 CONG. REC. 11,900 (daily ed. Dec. 12, 1945) (statement of Rep. Hancock). A Supreme Court decision overturning union members' convictions for using threats of violence to obtain wages without working prompted the legislation. *See* United States v. Local 807, Int'l Bhd. of Teamsters, 315 U.S. 521 (1942).

169 *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 932 (1982) (noting the "special dangers . . . associated with conspiratorial activity").

170 *See Scheidler*, 510 U.S. at 262 (rejecting the argument that the free speech clause requires that RICO be interpreted to apply only to "predicate acts" undertaken with an economic motive).

significantly impact socially valuable expression. Organized crime's purpose is to make money, not to speak. Its effect is to "drain[ ] billions of dollars from America's economy"[171] without countervailing social value. The fact that the activities are "patterned" increases their social harm.[172] The same is true of the securities and general commercial fraud cases that form the bulk of civil RICO applications.[173] The underlying acts are unlawful, which translates into socially harmful and prohibitable. Aggregating the acts only makes them worse from a social harm standpoint.

Finally, although several Justices have "caution[ed] courts applying RICO to bear in mind the First Amendment interests that could be at stake,"[174] their primary concern was the possibility that "fully protected First Amendment activity" could "amount to Hobbs Act extortion" or meet the definition of "one of the other, somewhat elastic RICO predicate acts."[175] Although they did not "catalog [all] the speech issues that could arise in a RICO action against a protest group,"[176] their comments presumed the current free speech clause model. Therefore, their caveat with respect to the conduct that may qualify as a predicate act under RICO would not appear to extend to conduct that is unlawful because of nonspeech-related harms that it causes, such as civilly disobedient lawbreaking.

3. *Punitive Damages*

The purpose of punitive damages is to punish and deter "extreme departures from acceptable conduct."[177] They are awarded on top of compensatory damages, often creating a windfall for the plaintiff that courts tolerate "as a means of securing public good through a kind of quasi-criminal punishment in the civil suit."[178] Unlike the statutory penalty enhancements that supply explicit maximums or multipliers, punitive damages are discretionary in amount, with the jury usually instructed to award a sum of money appropriate

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171 Organized Crime Control Act of 1970, Pub. L. No. 91-452, 1970 U.S.C.C.A.N. (84 Stat. 922) 1073, 1073.

172 *See id.* ("[O]rganized crime in the United States is a highly sophisticated, diversified, and widespread activity.").

173 *See* Report of the Ad Hoc Civil RICO Task Force of the A.B.A. Section of Corporation, Banking and Business Law 1, 55-56 (1985) (noting that 40% of civil RICO cases surveyed involved securities fraud and 37% involved general commercial fraud).

174 *Scheidler*, 510 U.S. at 265 (Souter, J., and Kennedy, J., concurring).

175 *Id.* at 264.

176 *Id.* at 265.

177 DOBBS, *supra* note 102, § 3.11(1), at 452.

178 *Id.* at 457.

to accomplish the judgment's punitive and deterrence goals.[179]

Punitive damages apply to a broader range of types of conduct than the statutory penalty enhancements, which narrow the types of conduct to which they apply according to specified characteristics. Punitive damages can apply to almost any type of tort,[180] when, in the jury's judgment, the defendant's motive for acting was so bad as to require punishment on top of compensation for the actual damages caused by the conduct.

There are some constitutional limits on punitive damages awards. Detailed rules limit the chilling effect of libel awards on speech about public issues.[181] In addition, grossly excessive awards for tortious speech or conduct may violate due process,[182] but, as a general matter, awards of substantial extracompensatory damages for conduct deemed by a jury to be very bad and thus deserving of punishment and deterrence comport with the Constitution.[183]

There is no reason to believe that the current constitutional framework would attach any special level of scrutiny to punitive damages awards for torts

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[179] Dobbs states that:

> If the judge decides that the facts warrant submission of the case to the jury on the punitive damages issue, the jury's discretion determines (a) whether to make the award at all, and (b) the amount of the award, as limited by its purposes [which almost always include (a) punishment or retribution and (b) deterrence], subject only to review as other awards are reviewed.

Id. at 453.

[180] Punitive damages do not generally apply to breach of contract actions because of the broad common law policy judgment that entering into contracts is socially desirable conduct that should not be deterred by the threat of a punitive award for breaching. *See id.* § 12.5(2), at 452.

[181] *See* New York Times v. Sullivan, 376 U.S. 254, 279–80 (1964) (To recover any damages, including punitive damages, a public official or public figure must prove the allegedly libelous statement is false in fact and that the defendant acted with knowledge of or reckless disregard as to its falsity.); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (To recover punitive damages where the defamation deals with an issue of public concern, a private person must meet the *New York Times* standard.).

[182] *See* BMW of North America v. Gore, 517 U.S. 559 (1996). The jury in this case awarded $4000 compensatory damages and $4 million in punitive damages to a plaintiff because BMW did not inform him that his new car had been repainted. The Court found the punitive award excessive in a number of respects: the egregiousness of the defendant's conduct, the ratio of compensatory damages to punitive damages, and the criminal penalties for the type of misconduct.

[183] *See* Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (Punitive damages awards do not generally violate the Constitution, but may in particular cases.).

committed for the purpose of expression.[184] The Oregon Supreme Court recently rejected just such a free speech clause claim.[185] In that case, detailed more fully in hypothetical four above, members of an environment group boarded a private company's logging equipment, located on a government access road, to protest federal forest preservation policies. The court relied upon the general principles gleaned from the current free speech clause model to uphold the jury's award of punitive damages on top of compensatory damages for equipment damage and lost logging time.[186] "[T]he tort of trespass to chattels is aimed at conduct not protected by . . . the First Amendment,"[187] which, in that case, "produced a special cognizable harm (an interference with plaintiff's possessory interest in its property), distinct from any communicative impact."[188]

In addition to the speech/conduct distinction, the breadth of the possible applications of the tort played a role in the court's analysis.[189] On its face, the trespass to chattels tort does not target expression.[190] Neither are its usual applications to expression.[191] Thus, the government was not targeting expression or any particular point of view in defining the tort. Moreover, as to the jury's consideration of viewpoint, defendants were entitled to, but failed to request, a limiting instruction.[192] Yet even with such an instruction, a properly instructed jury "could have awarded punitive damages based on the predicate of defendants' trespassory conduct alone [independently of any accompanying expression of views]."[193] Thus, an award of punitive damages based upon "the

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[184] *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918 (1982) ("[L]osses proximately caused by unlawful conduct may be recovered" when such conduct is mixed with "nonviolent, protected activity.").

[185] *See* Huffman & Wright Logging Co. v. Wade, 857 P.2d 101 (1993).

[186] The court's primary discussion concerned the free speech guarantee of the state constitution. *See id.* at 106–12.

[187] *See id.* at 112.

[188] *See id.* (citing Adderly v. Florida, 385 U.S. 39, 47 (1966)).

[189] Although the bulk of the court's discussion concerns state constitutional law, the same general principles seem to apply to its federal constitutional law conclusions.

[190] *See Huffman*, 857 P.2d at 110 ("The content of speech is not an element of the tort.").

[191] *See id.* ("[T]his tort cannot readily be committed by speech, even if speech accompanies the trespass.").

[192] *See id.* at 111 (finding defendants' argument that the punitive damages award was viewpoint-based "speculative," but noting that "[e]ven if defendants are correct, . . . the power to avoid being punished for any protected expression lay in their own hands").

[193] *Id.* Although the court made this statement in its state law discussion, this reasoning is implicit in the brief federal constitutional discussion, which relies upon the speech/conduct distinction. *See id.* at 112 (referring to its state law conclusion in finding "the same

character of defendants' conduct" and "defendants' motives"[194] comports with the Constitution's free speech guarantee.[195]

III. RELOCATING CIVIL DISOBEDIENCE AND PENALTY ENHANCEMENTS WITHIN THE CLARIFIED FREE SPEECH CLAUSE MODEL

A. *A Clarified Free Speech Clause Model*

The purpose of the current free speech clause model is to effectuate the few words of the Constitution that guarantee "freedom of speech."[196] Because civilly disobedient lawbreaking is publicly valuable expression, it should be analyzed differently than other illegal conduct that is functional only. A complete free speech model should include civil disobedience's public value as well as the harms that it necessarily causes. Several clarifications of the current analytical model can promote an analysis of civilly disobedient lawbreaking that better fulfills the spirit of the "freedom of speech" guarantee. Diagram B identifies the locations of these clarifications within the current free speech clause model.

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conclusion" to obtain "with respect to the First Amendment").

[194] *Id.* at 118 (Unis, J., dissenting) (quoting UNIFORM CIVIL JURY INSTRUCTION 35.01).

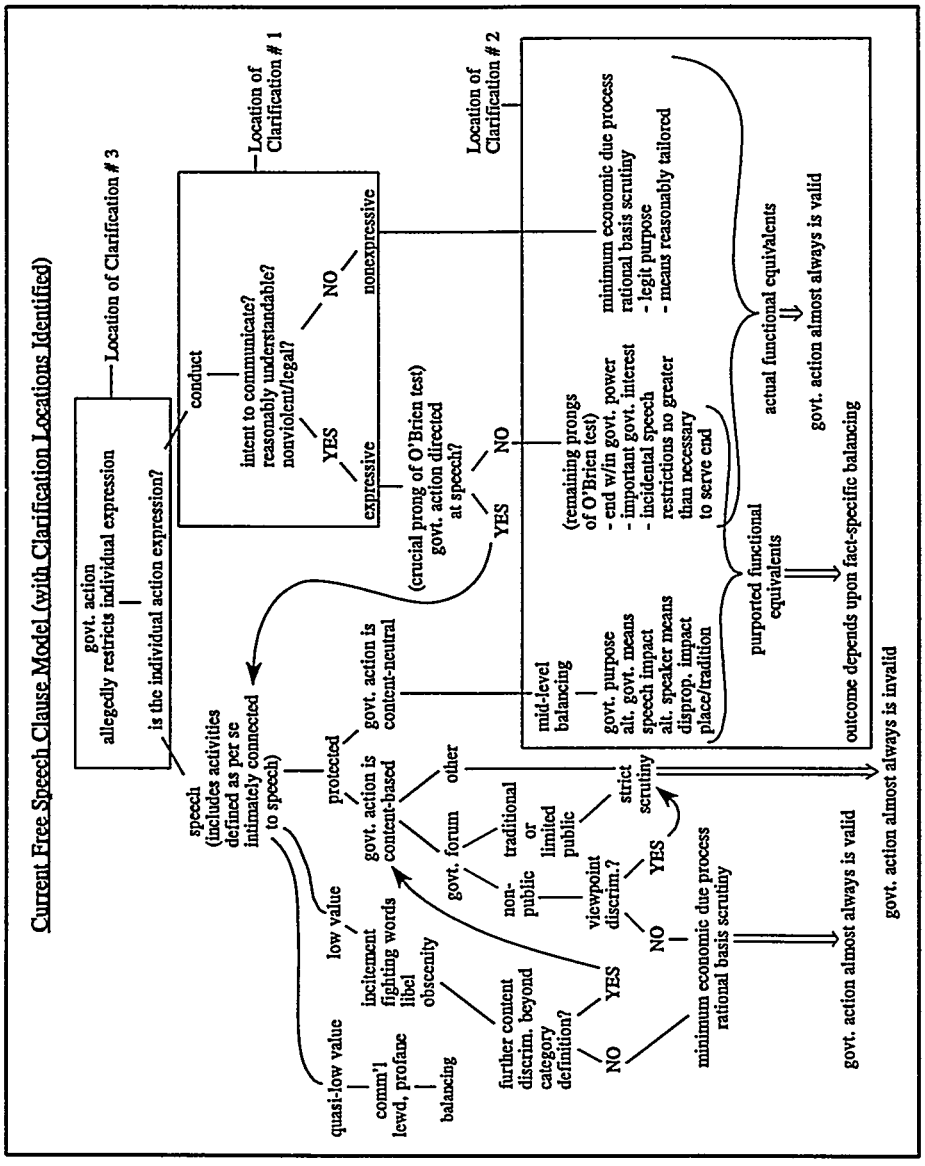
[195] The court also incorrectly reasoned that because "the First Amendment does not apply to private property that is not devoted to public use," there could be no constitutional challenge to an award of punitive damages based upon a trespass to private personal property. *Id.* at 112 ("[P]laintiff did not invite members of the general public to climb on or chain themselves to its equipment or otherwise subject itself to the proscriptions of the First Amendment."). In the political protest context, however, the free speech guarantee may impose limits on state tort liability even when some of the protesters' activities are illegal. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916–17 (1982) ("[T]he presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages."); *see also* New York Times v. Sullivan, 376 U.S. 254, 265 (1964). In *New York Times*, the Supreme Court disposed of the argument that the plaintiff could not challenge a state law defamation damages award because:

> The Fourteenth Amendment is directed against State action and not private action . . . . That proposition has no application to this case. Although this is a civil lawsuit between private parties, the [state] courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press.

Id.

[196] U.S. CONST., amend. I.

Diagram B


Current Free Speech Clause Model (with Clarification Locations Identified)
govt. action
allegedly restricts individual expression
Location of Clarification # 3
is the individual action expression?
conduct
Location of Clarification # 1
intent to communicate?
reasonably understandable?
nonviolent/legal?
YES
NO
expressive
nonexpressive
(crucial prong of O'Brien test)
govt. action directed at speech?
YES
NO
Location of Clarification # 2
speech (includes activities defined as per se intimately connected to speech)
protected
govt. action is content-neutral
govt. action is content-based
other
mid-level balancing
(remaining prongs of O'Brien test)
govt. purpose
alt. govt. means
speech impact
alt. speaker means
disprop. impact
place/tradition
- end w/in govt. power
- important govt. interest
- incidental speech restrictions no greater than necessary to serve end
minimum economic due process
rational basis scrutiny
- legit purpose
- means reasonably tailored
purported functional equivalents
actual functional equivalents
govt. action almost always is valid
outcome depends upon fact-specific balancing
govt. action almost always is invalid
govt. forum
traditional or limited public
non-public
strict scrutiny
viewpoint discrim.?
YES
NO
quasi-low value
comm'l
lewd, profane
balancing
low value
incitement
fighting words
libel
obscenity
further content discrim. beyond category definition?
NO
YES
minimum economic due process
rational basis scrutiny
govt. action almost always is valid

1. *The Expressive Conduct Definition*

The Court's recent statement that physical assault cannot be "expressive conduct protected by the First Amendment"[197] implies that there are per se categories of nonexpressive conduct without explaining the criteria for the categorization.[198] Its blanket pronouncement stems from the worry that has plagued the Court throughout its review of expressive conduct: That, absent some restriction, "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[199] The impulse to draw a bright line is understandable—the specter of political assassination as constitutionally protected expression is the oft-cited example of the base of the slippery slope.[200] The Court's statement, however, conflates two categories that do not necessarily go together—expression and constitutional protection.[201] Separating these two strands of analysis substitutes an analytically coherent free speech model for the current categorical definitions.

For the proposition that physical assault is not expressive conduct, the *Mitchell* Court cited *Roberts v. United States Jaycees*, remarking on the constitutionality of anti-discrimination legislation that "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection,"[202] and *NAACP v. Claiborne Hardware Company*, noting in the context of an economic boycott designed to coerce local merchants to respect civil rights that "[t]he First Amendment does not protect violence."[203] Although, like the *Mitchell*

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197 Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993).

198 *See id.*

199 *Id.* (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)).

200 *See* WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL RIGHTS AND LIBERTIES 692 (8th ed. 1996) (asking whether "a political assassination [would] be unprotected expression because it is not within the scope of the first amendment or because the government interests outweigh the expressive values"); Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 836 (1993) (noting that the result of an expressive conduct definition that looked only to the two prongs of actor intent and audience understanding "might seem to have extreme consequences—for example, an attempted assassination of the President may well qualify as speech," but emphasizing that this conclusion does not mean the speech is constitutionally protected because the government has a strong interest in protecting the President's life).

201 *See, e.g.*, SCHAUER, *supra* note 118, at 89–91 (distinguishing between constitutional coverage and constitutional protection).

202 468 U.S. 609, 628 (1984) (citing Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984)).

203 458 U.S. 886, 916 (1982).

decision, both of these opinions indicated that certain types of conduct are outside the bounds of free speech clause protection, they did not specifically classify the types of conduct as per se nonexpressive. Instead, in the sentence preceding the widely quoted "special harms" statement from *Roberts*, the Court explained that "acts of invidious discrimination . . . cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit."[204]

In light of this explanation, the next sentence addressing "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact" means that "such practices are entitled to no constitutional protection" because the government interest outweighs the social value of what might be expressive conduct. Thus, the *Mitchell* Court's statement that physical assault can never be expressive conduct is best understood as inexact. Even the most egregiously harmful activity may be "potentially expressive," meeting the Court's two-part test: The actor intends to communicate and the audience is likely to understand the communication.[205] Nevertheless, some limited types of conduct will always be unprotected.[206] Rather than indicating a per se judgment as to whether physical assault is expressive, the *Mitchell* Court's statement should be understood to mean that, because of the individual and social harm inherent in the conduct, the government's interest in preventing physical assault will always outweigh the actor's choice of means of expression. That is, physical assault is per se *unprotected* rather than per se nonexpressive.[207]

Understanding the Court's statements about violence and the undefined range of "potentially expressive activities" in this way harmonizes its conduct analysis with its pure speech analysis. With speech, too, the Court has defined certain limited categories, balanced them on a per se basis with the government's interest in regulating the speech, and declared those certain types of speech unprotected.[208] Because the "unprotected" designation means that the government may entirely suppress such speech,[209] whether the speech is called

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[204] *Roberts*, 468 U.S. at 628.

[205] *See* Spence v. Washington, 418 U.S. 405, 410–11 (1974).

[206] *See, e.g.*, Sunstein, *supra* note 200, at 834 ("[The] government often does have special and sufficiently neutral justification for regulating conduct.").

[207] *See, e.g.*, *id.* at 835 ("The key to the distinction [between speech and conduct], often thought to lie in the determination of whether the conduct qualifies for initial protection, actually lies in the fact that government often has good reasons for regulating it.").

[208] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) ("[T]hese areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content.").

[209] The government may entirely suppress the speech based upon the content element

"unprotected" or not speech at all may appear inconsequential. Instead, the initial designation of the activity as "speech" is analytically crucial. By recognizing that the activity within the unprotected category has the outward characteristics of speech, the Court necessarily makes the definition of the unprotected category dependent upon the balance between the activity's expressive value and the government's interest in suppressing it.[210] The point at which this no longer balances on a per se basis marks the outer limit of the unprotected category.[211]

This characterization of the *Mitchell* Court's reference to physical assault as striking the same balance with respect to conduct as it has with respect to certain speech categories is important because it means that the per se categories of unprotected conduct must have a limit, too, where the balance between an act's expressive value and resulting harms no longer obtains. Specifically, the Court's potentially broad statements as to the unprotected nature of "violence" and "physical assault" do not necessarily apply to all acts of lawbreaking. Rather, as illegal acts become less violent and less personally directed, the balance between expressive value and social harm may come out differently according to the circumstances of particular actions. Diagram C illustrates this first clarification of the current free speech clause model.

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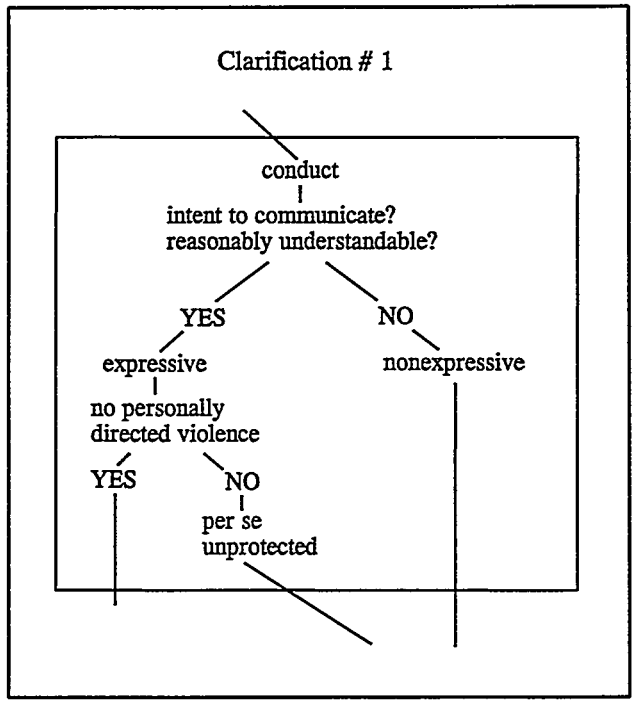
that defines it (obscenity, defamation), but any further content discrimination within the class of unprotected speech, unless it falls within an articulated exception, will invoke strict scrutiny review. *See id.*

[210] *See id.* at 386 ("[T]he exclusion of 'fighting words' from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a 'nonspeech' element of communication.").

[211] *See* Miller v. California, 413 U.S. 15, 24 (1973) (requiring, for a communication to be obscene, that "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest"; that the "work depict[ ] or describe[ ], in a patently offensive way, sexual conduct specifically described" by state law; and that "the work, taken as a whole, lack[ ] serious literary, artistic, political or scientific value"); Gooding v. Wilson, 405 U.S. 518, 524 (1972) (paraphrasing *Chaplinsky* fighting words test to require that the words "have a direct tendency to cause acts of violence by the person to whom individually, the remark is addressed"); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (requiring for constitutionally unprotected incitement that "such advocacy [be] directed to inciting or producing imminent lawless action and [be] likely to incite or produce such action"); New York Times v. Sullivan, 376 U.S. 254, 266 (1964) (defining libel as a false statement of fact and imposing other proof requirements to avoid chilling politically valuable speech).

Diagram C



2. *The Same Multi-Factor Balancing Test Applies to Expressive Conduct as to Content-Neutral Speech Regulations*

According to the Court, there is "little, if any, differen[ce]" between the test it applies to expressive conduct and the one it applies to content-neutral speech regulations.[212] This should be a reality that renders some government rules that suppress expressive conduct unconstitutional because of their expressive impact, regardless of the government's motivation.[213]

On the speech side, the Court's analytical model reflects the recognition that government actions may violate the free speech guarantee even if the

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[212] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 & n.8 (1984).

[213] *See* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 130 (1981) ("[C]ontent-neutral restrictions may significantly undermine the value of free expression by imposing limitations on the opportunity for individual expression.").

government's target is not the communication aspect of the regulated activity.[214] An important part of the analysis is determining the weight of the government interest, not just the fact that it has some substance.[215] Whether alternate means for the government to serve its interest exist is another important consideration,[216] with the Court sometimes looking to whether the expression-restrictive government action is significantly underinclusive of other obvious contributors to the problem it is addressing.[217] The impact on expression is an important consideration, both absolutely[218] and as to the types of speakers affected.[219] Whether alternate, similarly effective means are

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[214] The designation "content-neutral" means that the government has adopted a regulation of speech "without reference to the content of the regulated speech." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (reviewing noise regulations (quoting *Community for Creative Non-Violence*, 468 U.S. at 293)).

[215] *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 53 (1994) ("Ladue's sign ordinance is supported principally by the City's interest in minimizing the visual clutter associated with signs, an interest that is concededly valid but certainly no more compelling than the" City's interest in maintaining a stable, racially integrated neighborhood, which was not sufficient to support a prohibition of residential 'For Sale' signs in *Linmark Assoc., Inc. v. Willingboro*, 431 U.S. 85 (1977)).

[216] *See, e.g.*, *City of Ladue*, 512 U.S. at 58–59 ("We are confident that more temperate measures could in large part satisfy Ladue's stated regulatory needs without harm to the First Amendment rights of its citizens.").

[217] *See, e.g.*, *id.* at 51 ("While surprising at first glance, the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles."); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (requiring, to justify its billboard ban, that San Diego demonstrate a comprehensive coordinated effort in its commercial and industrial areas to address other obvious contributors to an unattractive environment).

[218] *See, e.g.*, *City of Ladue*, 512 U.S. at 55 ("Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech.").

[219] *See, e.g.*, *id.* at 57 ("Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute."); City Council v. Taxpayers for Vincent, 466 U.S. 789, 812–13 n.30 (1984) (noting that "the Court has shown special solicitude for forms of expression that are much less expensive than feasible alternatives and hence may be important to a large segment of the citizenry," but that "this solicitude has practical boundaries"); Martin v. City of Struthers, 319 U.S. 141, 146 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people."); *see also* Kovacs v. Cooper, 336 U.S. 77, 102 (1949) (Black, J., dissenting). Black stated that:

> Laws which hamper the free use of some instruments of communication thereby favor competing channels . . . . There are many people who have ideas that they wish to

available to the speaker to communicate is a crucial consideration.[220] The result is a true balance of social values—the public interest in robust and uninhibited political dialogue against the generally shared interest in having the majority government efficiently accomplish its nonspeech-related goals.

Why is the purportedly identical balancing of expressive conduct restrictions less even-handed in practice? The answer appears to be that with conduct the Court has implicitly resolved some of the considerations on a per se basis in the government's favor. The assumption seems to be that an adequate speech alternative exists to expressive conduct.[221] Thus, the overall effect of the governmental action on public dialogue is *de minimis*.[222] But the Court's own observations belie this assumption.[223] Also, because conduct restrictions are not aimed at normal means of communication,[224] there may appear to be little danger of a disproportionate impact upon speakers with certain points of view. Yet, in those instances where lawbreaking is, in fact, a means of communication, the expression-related effect of enforcing the law will fall disproportionately upon those who oppose government action.[225]

None of these particular considerations dictate a result. However, all of

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> disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places.

Id.

[220] *See, e.g.*, *City of Ladue*, 512 U.S. at 54 (noting that the City, by banning residential signs, had "almost completely foreclosed a venerable means of communication that is both unique and important").

[221] *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (noting that the National Park Service ban on overnight sleeping could not be faulted "on the ground that without overnight sleeping the plight of the homeless could not be communicated in other ways").

[222] *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 571 (1991) ("[T]he requirement that the dancers don pasties and a G-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic.").

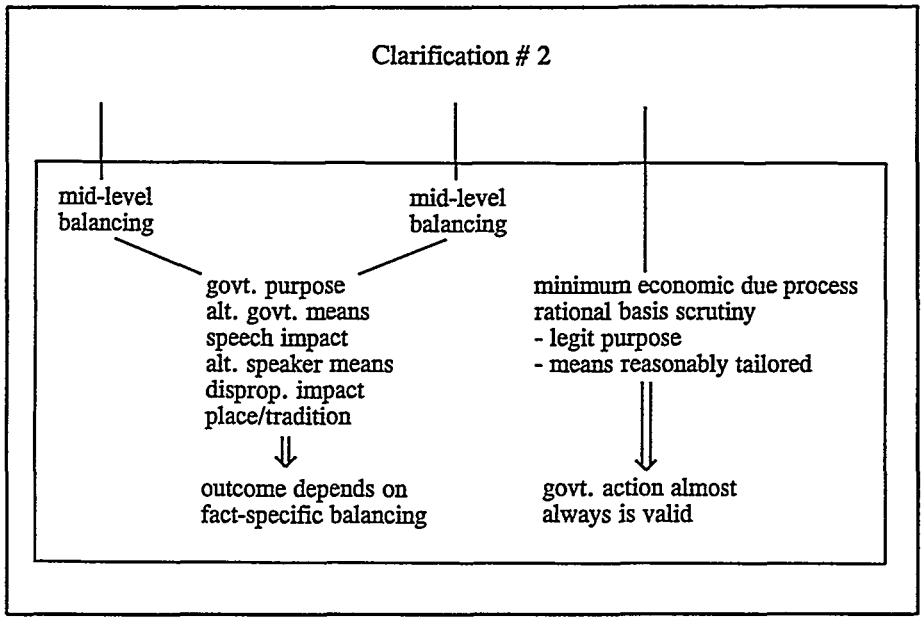
[223] *See, e.g.*, Spence v. Washington, 418 U.S. 405, 410 (1974) (Flags "are a form of symbolism comprising a 'primitive but effective way of communicating ideas'" and may represent "a short cut from mind to mind." (quoting Board of Educ. v. Barnette, 319 U.S. 624, 632 (1943))).

[224] *Compare* United States v. O'Brien, 391 U.S. 367, 376 (1968) (referring to the "alleged communicative element in [the draft card burning] conduct") *with City of Ladue*, 512 U.S. at 56 ("[W]e are not persuaded that adequate substitutes exist for the important *medium of speech* that Ladue has closed off.") (emphasis added).

[225] *See, e.g.*, Geoffrey S. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 221–22 (1983) ("As applied to expression, the [anti-draft card burning statute in O'Brien] had an obvious disparate impact on those who opposed government policy, for who would destroy a draft card as an expression of *support* for government policy?").

them should enter into a determination of whether a particular government action comports with the free speech guarantee because they may vary according to the specific expressive conduct at issue. That is, none of them should be removed from the analysis just because the impacted activity is conduct rather than verbal expression. Diagram D portrays this second clarification.

Diagram D



3. *The Overriding Prohibition on Government Viewpoint Discrimination*

The core free speech principle is that the government may not "proscrib[e] speech . . . because of disapproval of the ideas expressed."[226] But what of conduct? If conduct is expressive, then a crucial part of the analysis asks whether the government action is message-directed.[227] If so, the conduct effectively becomes speech, and the government must justify its restriction under the strict scrutiny standard.[228] If conduct is nonexpressive, its treatment under the current model is less clear. Some of the Court's statements imply that once conduct is deemed nonexpressive, free speech analysis is over.[229]

The better view, however, is that the rule against government viewpoint discrimination cuts across all government actions, from those that impact pure speech to those that impact nonexpressive conduct.[230] In any situation where a government action distinguishes on the basis of viewpoint the "specter" exists "that the government may effectively drive certain ideas or viewpoints from the marketplace."[231] Thus, strict scrutiny review must apply any time that a government regulation of anything targets a particular point of view.

According to established precedent, although this broad rule against viewpoint discrimination requires a court to look for an intent discernable on the face of the government action,[232] the philosophy behind the rule is not so

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226 R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

227 *See O'Brien*, 391 U.S. at 367, 377–78.

228 *See supra* notes 65–66 and accompanying text.

229 *See* Brownstein, *supra* note 132, at 631 ("[O]ne might imply [sic] that viewpoint-discriminatory regulations of conduct are constitutional from the Court's emphasis in *Mitchell* on the fact that the hate crimes statute only regulated conduct as the basis for distinguishing *Mitchell* from *R.A.V.*").

230 *See, e.g.*, *id.* at 629–30. Brownstein stated that:

> [I]t is entirely irrelevant that [a] viewpoint-discriminatory regulation of unprotected speech is directly restricting speech, and not conduct . . . . [Law] that allows Republicans to physically assault Democrats but punishes Democrats for physically retaliating against their assailants is probably even more violative of First Amendment principles than a law allowing Republicans, but not Democrats, to use fighting words in public debates.

Id. See also Weinstein, *supra* note 112, at 361 ("Although no Supreme Court case is precisely on point, this [principle that government may not constitutionally enact laws that, by their terms, favor or disfavor any political ideology] should extend even to regulation of criminal activity that is neither speech nor expressive conduct.").

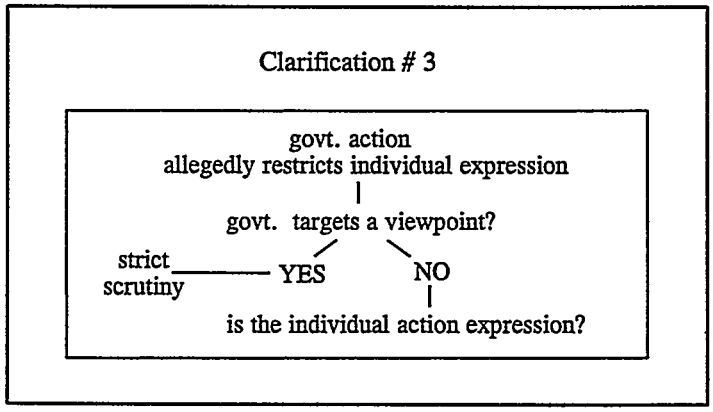
231 R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1991).

232 *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 763 (1994) (In determining whether a government action is viewpoint-based, "the government's purpose [is]

limited.[233] As the Court has recognized when looking with care at content-neutral speech restrictions and even more specifically at the rule's disproportionate impact on particular types of speakers, a government motive to suppress speech is not the only evil that the free speech clause addresses.[234] To fully guarantee that minority points of view remain part of the political dialogue, the Constitution must protect expression from unconscious as well as purposeful silencing. Thus, the general rule against government viewpoint discrimination suggests that some level of scrutiny beyond the extraordinarily deferential rational basis should be triggered when any government action has the effect of disproportionately silencing expression of a particular point of view.[235] Specifically, this disproportionate viewpoint impact of a government action should be one of the factors in the constitutional balance whether a government regulation impacts expression through the means of speech or conduct.

Diagram E portrays this last clarification of the current free speech clause model. Diagrams F and G, first with the clarification locations identified, then without such identifications, portray the fully clarified free speech clause model that should guide analysis of penalty enhancements applied to civil disobedience.

Diagram E



the threshold consideration.").

[233] *See, e.g.*, Williams, *supra* note 75, at 676–94 (demonstrating that viewpoint discriminatory impact is of concern under a number of free speech theories).

[234] *See, e.g.*, Stone, *supra* note 225, at 189–90 (arguing that more than a government motive to suppress speech underpins the content-based/content-neutral speech distinction).

[235] *See, e.g.*, Williams, *supra* note 75, at 706–07 (arguing that the standard of review in symbolic speech cases should rise to the level of strict scrutiny).

Diagram F

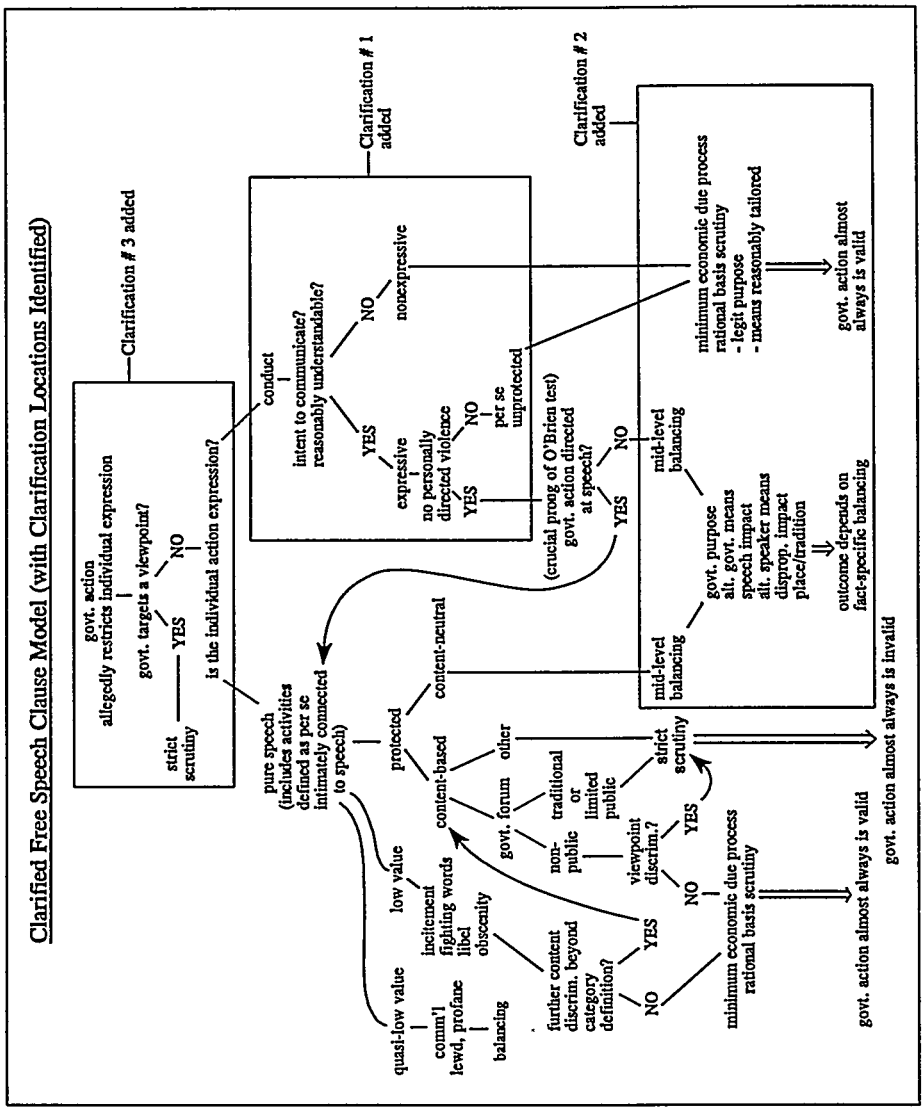
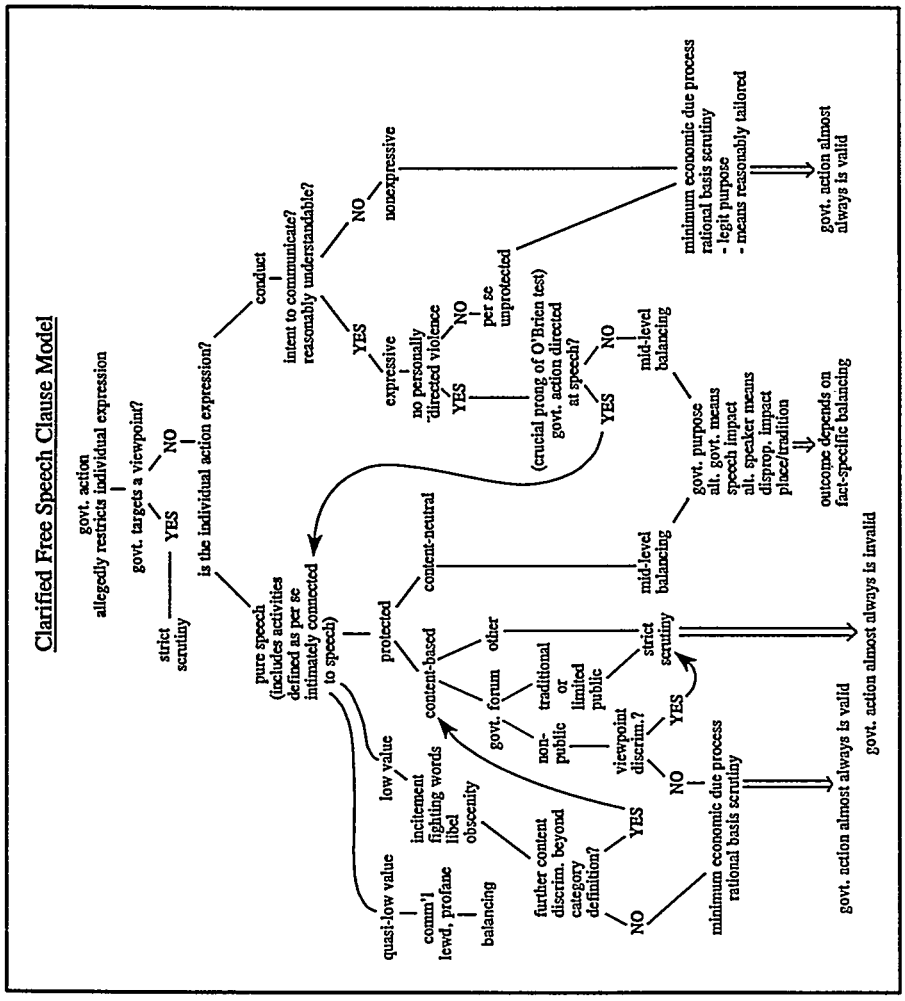

Clarified Free Speech Clause Model (with Clarification Locations Identified)
govt. action
allegedly restricts individual expression
govt. targets a viewpoint?
strict scrutiny
YES
NO
is the individual action expression?
Clarification # 3 added
pure speech (includes activities defined as per se intimately connected to speech)
conduct
intent to communicate?
reasonably understandable?
YES
NO
nonexpressive
Clarification # 1 added
expressive
no personally directed violence
YES
NO
per se unprotected
(crucial prong of O'Brien test)
govt. action directed at speech?
YES
NO
Clarification # 2 added
protected
content-neutral
mid-level balancing
minimum economic due process
rational basis scrutiny
- legit purpose
- means reasonably tailored
govt. action almost always is valid
govt. purpose
alt. govt. means
speech impact
alt. speaker means
disprop. impact
place/tradition
outcome depends on fact-specific balancing
mid-level balancing
content-based
govt. forum
other
traditional or limited public
non-public
strict scrutiny
viewpoint discrim.?
YES
NO
low value
incitement
fighting words
libel
obscenity
further content discrim. beyond category definition?
YES
NO
quasi-low value
comm'l lewd, profane
balancing
minimum economic due process
rational basis scrutiny
govt. action almost always is valid
govt. action almost always is invalid

Diagram G


Clarified Free Speech Clause Model
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minimum economic due process
rational basis scrutiny
- legit purpose
- means reasonably tailored
govt. action almost always is valid
protected
content-neutral
mid-level balancing
govt. purpose
alt. govt. means
speech impact
alt. speaker means
disprop. impact
place/tradition
outcome depends on fact-specific balancing
content-based
other
strict scrutiny
govt. forum
traditional or limited public
non-public
viewpoint discrim.?
YES
NO
low value
incitement
fighting words
libel
obscenity
quasi-low value
comm'l
lewd, profane
balancing
further content discrim. beyond category definition?
YES
NO
minimum economic due process
rational basis scrutiny
govt. action almost always is valid
govt. action almost always is invalid

B. *Civil Disobedience's Place in the Clarified Free Speech Clause Model*

Civil disobedience, as intentional lawbreaking engaged in for the purpose of expression and under circumstances where it is likely to be understood,[236] must be viewed as expressive conduct. Yet civil disobedience is importantly distinct both from the broad class of lawbreaking and the broad class of expressive conduct, thus requiring a free speech analysis all its own.

The usual lawbreaking is where one individual asserts his will against the will of the majority (embodied in the law) for selfish purposes, accompanied by an effort to avoid detection and punishment. The act is functional, rather than expressive,[237] and the act evidences contempt for the democratic principle of majority rule. The civil disobedient also asserts his will against the will of the majority, but in a different way and for a different purpose. Civil disobedience is a public act.[238] The purpose is to convey a political message from the minority to the majority.[239] The civil disobedient's willingness to accept the punishment demonstrates a respect for the general principle of the rule of law at

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[236] *See* Spence v. Washington, 418 U.S. 405, 415 (1974) (establishing this two-part test).

[237] *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294–95 (1983) (separating sleeping as functional from sleeping as expressive).

[238] *See, e.g.*, CARL COHEN, CIVIL DISOBEDIENCE: CONSCIENCE, TACTICS, AND THE LAW 39 ("Civil disobedience is an act of protest . . . publicly performed."); RAWLS, *supra* note 11, at 366 ("[C]ivil disobedience is a public act."); Frank M. Johnson, *Civil Disobedience and the Law*, 44 TUL. L. REV. 1, 6 (1969) (stating that civil disobedience is "an open, intentional violation of law"); Keeton, *supra* note 98, at 508 ("[The] act of civil disobedience [is] . . . an act of deliberate and open violation of law."); Martha Minow, *Breaking the Law: Lawyers and Clients Struggle for Social Change*, 52 U. PITT. L. REV. 723, 733 n.38 (1991) ("'Civil disobedience' is . . . undertaken in a public way . . . ."); Sanford J. Rosen, *Civil Disobedience and Other Such Technicalities: Law Making Through Law Breaking*, 37 GEO. WASH. L. REV. 435, 442 (1969) ("Civil Disobedience . . . may be defined as open."); van den Haag, *supra* note 94, at 27 ("[C]ivil disobedience [occurs] when a law is deliberately disobeyed to publicly demonstrate opposition . . . to laws or policies of the government."). *But see* MICHAEL J. PERRY, MORALITY, POLITICS AND LAW 118 (1988) ("The position that disobedience must be open or public to be legitimate is also untenable.") (footnote omitted).

[239] *See, e.g.*, RAWLS, *supra* note 11, at 366 ("One may compare [civil disobedience] to public speech, and being a form of address, an expression of profound and conscientious political conviction."); Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 122–23 ("[Civil disobedience] illustrates depth of commitment by the minority—a factor the majority should wish to consider in setting policy. [Civil disobedience] grabs the attention of the majority, thus promoting debate and lessening public apathy.").

the same time that the act communicates dissent from the law's particular provisions.[240] All of these factors combined transform a presumptively socially harmful criminal act into socially valuable expressive conduct that, unlike most other acts of lawbreaking, should trigger free speech clause analysis.[241]

The fact, however, that civil disobedience's social value is inextricably entwined with lawbreaking distinguishes it as a subset of the broader class of all expressive conduct. Whereas conduct that does not depend upon lawbreaking to convey its message can, at least in theory, be immune from punishment,[242] such punishment is part of civil disobedience's definition.[243] Thus, under the clarified free speech clause model, the base act of civil disobedience is covered. That is, it qualifies as expressive conduct and thus is subject to the multi-factor balancing test. Yet the result of this balancing in any particular case of civil disobedience will be that it is ultimately unprotected. This result stems from the general commitment to orderly democratic government that undergirds all constitutional models. While the Constitution guarantees certain individual rights, its underlying democratic philosophy is that relevant majorities can legitimately make laws and enforce them against dissenters.[244] Recognizing

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[240] *See* RAWLS, *supra* note 11, at 366. Rawls stated that:

> [Civil disobedience] expresses disobedience to law within the limits of fidelity to law, although it is at the outer edge thereof. The law is broken, but fidelity to law is expressed by the public and nonviolent nature of the act, by the willingness to accept the legal consequences of one's actions.

Id. (footnote omitted).

[241] *See, e.g.*, Ledewitz, *supra* note 6, at 571 (condemning the "binary thinking of legal/illegal" as "ridiculous in the context of political protest," but noting that "it is difficult for judges" to see value in law-violation).

[242] The crux of the expressive conduct claim is that a regulation, valid as applied to purely functional conduct, may not constitutionally be applied to restrict expression. Where lawbreaking is not a crucial part of the expression, lifting the punishment in a particular instance is an accommodation and, when recognized as a limited exception based upon important competing interests, preserves the principle of the rule of law. Thus, for example, had the Community for Creative Non-Violence protesters been permitted to remain during the night in the government park, their message, communicated through sleeping without a permanent shelter, would have remained, and the government would have retained the ability to enforce the anti-sleeping regulation against others who did not have as substantial an expressive purpose or none at all. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1983) (Initial erection of the tent cities was with the permission of the Park Service, so breaking the law was not part of the message.).

[243] *See, e.g.*, Ledewitz, *supra* note 6, at 571 ("[B]y far the greatest difficulty in protecting the sit-in is simply that the sit-in is, and must remain, illegal.").

[244] *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 554–55 (1965) ("The constitutional

lawbreaking as a protected form of expression could lead to anarchy as everyone disobeyed laws with which they disagreed and then sought constitutional protection for their lawless actions.[245] The general presumption of the rule of law is that the proper form of protest against particular government actions is through lawful speech and action designed to change it.[246] Thus, whatever the expressive value of the act of intentional lawbreaking—and it may be substantial—the government interests both in vindicating the private interests affected[247] and, more importantly, in protecting the general societal interest in maintaining the rule of law will always outweigh it.[248]

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guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy."); RAWLS, *supra* note 11, at 363 ("[The question of when civil disobedience is justified] involves the nature and limits of majority rule.").

[245] *See* United States v. Berrigan, 283 F. Supp. 336, 339 (D. Md. 1968). This district court stated that:

> No civilized nation can endure where a citizen can select what law he would obey because of his moral or religious belief. It matters not how worthy his motives may be. It is axiomatic that chaos would exist if an individual were permitted to impose his beliefs upon others and invoke justification in a court to excuse his transgression of a duly-enacted law.

Id.

[246] *See, e.g.*, Adderly v. Florida, 385 U.S. 39, 48 (1966) ("[P]eople who want to propagandize protest or views [do not] have a constitutional right to do so whenever and however and wherever they please."); Michigan AFL-CIO v. Michigan Employment Relations Comm'n, 538 N.W.2d 433, 492 (Mich. App. 1995) ("[A]ny citizen[ ] who wishes to protest may do so by lawful means, such as informational picketing, passing out leaflets, or addressing the school board during a public comment period.").

[247] *See, e.g.*, *Adderly*, 385 U.S. at 47. The Supreme Court stated that:

> Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute [against those who break it as a form of political protest] . . . . The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.

Id.

[248] *See, e.g.*, Pennsylvania v. Berrigan, 472 A.2d 1099, 1126 (Pa. Super. Ct. 1984).

> From the earliest times when man chose to guide his relations with fellow men by allegiance to the rule of law rather than force, he has been faced with the problem how best to deal with the individual in society who through moral conviction concluded that a law with which he was confronted was unjust and therefore must not be followed. . . . However, [thinkers throughout the ages] have been in general agreement that while in restricted circumstances a morally motivated act contrary to law may be

Nor does the disproportionate impact of enforcing the law against civil disobedients lead to a different constitutional conclusion. If this impact alone were enough to invalidate such enforcement, the rule of law would be undermined as everyone could become laws unto themselves rather than being bound by the principle of majority rule.[249] Where a particular type of conduct warrants punishment solely for the individual and social harms caused by its functional aspects, across-the-board application of the punishment to include those with an expressive purpose is appropriate.[250] In this constitutional democracy, everyone presumptively has the ability to participate in forming the law ultimately adopted by the majority, including the penalty provisions which generally apply to all lawbreakers who cause a particular type of harm. When dissatisfied minority members resort to lawbreaking to express their disagreement with majority action, they should justly pay the price that the majority has determined appropriate for the individual and social harms caused by the functional components that their acts share with all others who engage in the same class of unlawful conduct.[251] This crucial role of punishment to the social value of the civil disobedience thus distinguishes it as a subset within the broad category of expressive conduct.

Yet it is also critical to clarify exactly what type of penalty affects this distinction within the expressive conduct category. This is the normal penalty applied to the functional component of the acts within the broad class of lawbreaking. Specifically, when a protester chooses to break the law, she must accept the punishment the majority has deemed appropriate for the individual

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> ethically justified, the action must be non-violent and the actor must accept the penalty for his action.

Id. (quoting United States v. Moylan, 417 F.2d 1002, 1008–09 (4th Cir. 1969)).

[249] *See, e.g.*, Non-resident Taxpayers Ass'n v. Philadelphia, 341 F. Supp. 1139, 1145 (D.N.J. 1971). The district court stated that:

> [The conclusion that plaintiff's interest in communicating his disagreement with the tax laws by failing to pay them outweighs the government's interest in uniform collection] would tend to countenance almost any variety of "symbolic speech" as being within the protection of the First Amendment and would foster civil disobedience. Surely, the First Amendment cannot be judicially expanded to support such a construction.

Id. at 1146.

[250] *See, e.g.*, *Adderly*, 385 U.S. at 47 ("Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute against [political protesters].").

[251] *See, e.g.*, *Michigan AFL-CIO*, 538 N.W.2d at 493 ("A citizen may . . . choose to protest by violating the law, e.g., by staging a sit-in or other form of trespass protest. When citizens do so, they must face the consequences of their actions . . . .").

and social harms caused by the functional components of her action. Once she does so, however, she has begun the political dialogue, offering her sacrifice as proof of her sincerity and the depth of her convictions.[252] Accepting the base penalty for her action lends social value to her communication, distinguishing her lawbreaking from the broad class that includes all illegal actions for purposes of further free speech clause analysis. It is this further analysis that must occur when the government identifies certain functional acts as qualifying for enhanced punishment because of some characteristic that may correlate to the civil disobedient's expressive purpose.

C. *Penalty Enhancement's Place in the Clarified Free Speech Clause Model*

Analysis of the *Mitchell* Court's reasoning in light of the clarified free speech clause model reveals the constitutional limits of penalty enhancements. To recapitulate, the *Mitchell* Court addressed the defendant's claim of unconstitutional action in several ways. First, it noted that motive may legitimately define unlawful conduct and determine the severity of punishment.[253] Second, it stated that the enhancement statute was "aimed at conduct unprotected by the First Amendment" rather than expression.[254] Third, it noted that "special harms" stemming from the motive-based crimes warranted enhanced punishment.[255] Only the third has independent weight under the clarified free speech clause model.

The first, the traditional consideration of motive in defining and punishing offenses, only makes sense when the motive is defined as a bad thing.[256] Under any free speech clause model, it cannot be "bad" merely as a disfavored belief.[257] It has to be bad for a nonspeech-related reason—specifically a reason that connects the belief with socially harmful conduct.[258] Thus, the first

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[252] *See, e.g.*, RAWLS, *supra* note 11, at 367 ("We must pay a certain price to convince others that our actions have, in our carefully considered view, a sufficient moral basis in the political convictions of the community.").

[253] *See* Wisconsin v. Mitchell, 508 U.S. 476, 484–85 (1993).

[254] *Id.* at 487.

[255] *Id.* at 484.

[256] *See id.* at 485 (noting that a "bad" as opposed to a "good" motive is a legitimate sentencing consideration) (citing 1 W. LEFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 3.6(b), at 324 (1986)).

[257] *Id.* at 468 ("[A] defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge.").

[258] *Id.* (noting that where defendant's racial animus was "related" to the crime, it could be considered in sentencing).

justification is essentially the same as the third, which looks to the nonspeech-related harms that result from the motive.

The second relies on a speech/conduct distinction that tips the scales dramatically in favor of a law's validity where it aims at nonspeech-related consequences of conduct.[259] Under the revised model, which requires some serious level of consideration of the expressive impact of government action regardless of the government's purpose, the speech/conduct distinction would not be dispositive. Rather, where the conduct suppressed by the government action is expressive, the same balancing test would apply as to speech activities. The significance of the speech/conduct distinction in this instance would be only to signal that, because the government action is directed at conduct, it is less likely to substantially impact expression in the broad range of cases to which it may apply than a government action directed at a usual means of communication. In the smaller range of applications where the lawbreaking conduct is expressive, however, the signal is misleading.[260] Despite the presumption gleaned from the broad class of cases, in this particular instance the government action substantially affects expression.

It is the third reason—that the triggering characteristic plus the underlying conduct result in "special harms"—that must ground the constitutional analysis. The existence of these special harms justifies the government action in two distinct ways. First, separate, nonspeech-related harms give proof of a legitimate, nonspeech-related government motive.[261] Second, the "unique evils" attest to a different balance between the government interest and the potentially expressive conduct than occurred with the base penalty.[262] That is, the existence of special harms flowing from the subset of conduct that warrants the enhancement indicates that the characteristic that triggers the enhancement changes the underlying conduct in a way that tips the constitutional balance in favor of the government's interest.[263] Thus, as with application of the base

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259 *See supra* text accompanying notes 72–75 (explaining that the expressive conduct balancing test equates to minimal rational basis scrutiny in application).

260 *Cf.* Williams, *supra* note 75, at 706–07 (arguing that, because of a greater expressive impact, in the narrow range of cases where symbolic conduct is at issue a stricter standard of review should apply than in instances where the government action restricts usual means of expression).

261 *See Mitchell*, 508 U.S. at 488 ("The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases.").

262 *See* Roberts v. United States Jaycees, 468 U.S. 609, 629–30 ("In prohibiting [acts of invidious discrimination], the Minnesota [Human Rights] Act therefore responds precisely to the substantive problem which legitimately concerns the State . . . ." (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984))).

263 *See Mitchell*, 508 U.S. at 488 ("[I]t is but reasonable that among crimes of different

penalty for the functional components of the broad class of conduct, it is a balance between the government interest in enhancing the penalty and the expressive value of the underlying conduct—the act plus the distinguishing characteristics—that must justify the enhancement.

IV. APPLYING PENALTY ENHANCEMENTS TO CIVIL DISOBEDIENCE UNDER THE CLARIFIED FREE SPEECH CLAUSE MODEL

Within both the current and the clarified free speech clause model, the breadth of a penalty enhancement may be important proof of its constitutionality. Specifically, application of a penalty enhancement to motives that may encompass a range of viewpoints on a political topic may shield it from the strict scrutiny that should apply if the government targets a particular point of view.[264] This breadth of coverage carries its own danger, which is overinclusion.[265] Although a conduct-directed law may be valid in the bulk of its applications, it may be invalid in the more unusual instance where its application restricts constitutionally protected expression.[266] Because acts of civil disobedience constitute a segregable subset of acts that differs in a constitutionally significant way from the broad class of acts to which a penalty enhancement provision may apply, such acts must be isolated and separately analyzed to determine whether imposition of the enhancement comports with the free speech clause guarantee.

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natures those should be most severely punished, which are the most destructive of the public safety and happiness." (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 16 (1962))).

[264] *See, e.g.*, United States v. Dinwiddie, 76 F.3d 913, 923 (8th Cir. 1996) (Because "FACE would prohibit striking employees from obstructing access to a clinic in order to stop women from getting abortions, even if the workers were carrying signs that said, 'We are underpaid!' rather than 'Abortion is wrong!'" it "is content neutral and, therefore, need not survive strict scrutiny.").

[265] Where protected expression comprises a significant portion of a law's target, it may be facially overbroad and therefore unenforceable in any application. *See, e.g.*, Board of Airport Comm'n of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 575-77 (1987) (invalidating rule that proscribed all "First Amendment activities" in airport terminal).

[266] *See* TRIBE, *supra* note 54, at 1022 ("[A]lmost every law, such as [an] ordinary trespass ordinance . . . , is potentially applicable to constitutionally protected acts; that danger does not invalidate the law as such but merely invalidates its enforcement against protected activity.").

A. *Factors in the Constitutional Balance Presumptively Protect Civil Disobedience from Penalty Enhancement*

1. *Civil Disobedience's Social Value*

The social value of the expression lost when an ostensibly conduct-directed government action silences civilly disobedient expression must be a distinct factor in the balance that determines the action's validity. Civil disobedience is a part of a respectful public dialogue[267] about an intrinsically political topic—the majority's decision as to what should be the specific content of its law. The expression is about justice, fairness, political participation—issues in the stratosphere of the free speech hierarchy.[268] Moreover, it is political protest that, in its lawful manifestations, occupies a central place in the free speech clause's range of protection.[269]

That civil disobedience involves lawbreaking does not divest it of all positive social value. The political expression remains, often augmented by the publicity that the lawbreaking creates.[270] From before the American

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[267] *See, e.g.*, Linda Stewart Ball, *NAACP Chief Trains People in Civil Disobedience*, DALLAS MORNING NEWS, Mar. 16, 1997, at 40A (quoting a county commissioner who engaged in civil disobedience to say that "civil disobedience training is needed to educate residents about the protestors' goals").

[268] *See, e.g.*, Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 483 (1988) ("Political speech, we have often noted, is at the core of the First Amendment."); Buckley v. Valeo, 424 U.S. 1, 45 (1976) (characterizing campaign contribution and expenditure limits as impacting "core First Amendment rights of political expression"); Schultz v. Frisby, 807 F.2d 1339, 1344 (7th Cir. 1986) ("[I]ssues of public concern occup[y] the 'highest rung of the hierarchy of First Amendment values.'" (quoting, *inter alia*, Carey v. Brown, 447 U.S. 455, 467 (1980))).

[269] *See, e.g.*, Boos v. Barry, 485 U.S. 312, 318 (1988) (stating that prohibition of protest signs within 500 foot radius of an embassy "operates at the core of the First Amendment by prohibiting petitioners from engaging in classically political speech"); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913-14 (1982) ("While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the [protest] boycott in this case."); Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of* Rust v. Sullivan *and* Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724, 1763 (1995) ("Protests of any kind raise classic free speech issues."); *see also* Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (characterizing a protest gathering that constituted a trespass onto state government property as "an exercise of . . . basic constitutional rights in their most pristine . . . form"); SHIFFRIN, *supra* note 72, at 79 ("[T]he protection of dissent and its nurturance is a major American value.").

[270] *See, e.g.*, Albert Eisele, *The Scylla and Charybdis of Welfare Reform*, THE HILL, Dec. 13, 1995, at 26 (contrasting "[s]everal sharply different, and perhaps equally valid,

Revolution[271] through anti-slavery activities,[272] the women's suffrage movement,[273] civil rights[274] and anti-war activism,[275] up to the current environmental,[276] animal rights,[277] gay rights,[278] and abortion-related protests,[279] to name a few,[280] civil disobedience has contributed to the

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approaches to the debate over how to clean out the Augean stables of the nation's muddled welfare system" that occurred "on the same day last week": "One was a highly visible and dramatic act of civil disobedience that took place in the Capitol Rotunda" that "received the most media attention," while the "other was a little-noticed and thoughtful exchange of viewpoints by two luncheon speakers at the Georgetown University Conference Center"); Harrie, *supra* note 2, at A9 (describing House gallery protest by women opposed to legislature's treatment of low-income Utahns, after which a representative "scrambled upstairs to question [a television reporter] about whether he knew of the demonstration in advance and to attempt to dissuade him from airing a tape of the demonstration: "There's the potential when television cameras cover that of encouraging other groups," the representative said).

271 *See* CIVIL DISOBEDIENCE IN AMERICA 20 (David R. Weber ed., 1978) (chronicling the origin and history of American civil disobedience).

272 *See, e.g.*, ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 175–91 (1975) (detailing the activities of abolitionists and the judicial response); Matthew Lippman, *Liberating the Law: The Jurisprudence of Civil Disobedience and Resistance*, 2 SAN DIEGO JUST. J. 299, 317–28 (1994) (same).

273 Perhaps the most famous such incident was the prosecution of Susan B. Anthony for illegal voting. *See* CIVIL DISOBEDIENCE IN AMERICA, *supra* note 271, at 184–85.

274 *See, e.g.*, Videotape: Eye on the Prize Video Series (Judith Vecchione 1987) (PBS Home Video) (chronicling civil rights movement civil disobedience such as lunch counter sit-ins and freedom rides).

275 *See generally* STEVEN E. BARKAN, PROTESTORS ON TRIAL (1985) (chronicling history of anti-war movement, including acts of civil disobedience).

276 *See, e.g.*, Martinez, *supra* note 2, at B1. Martinez describes an environmental activist training camp where students can "take their activism beyond letter-writing campaigns . . . to 'direct action'[:] Pioneered by Greenpeace in the '80's, such pro-environmental efforts include boarding ships accused of using illegal fishing nets, occupying trees slated for logging and, most frequently, hanging huge banners from buildings." *Id.*

277 *See, e.g.*, JAMES M. JASPER & DOROTHY NELKIN, THE ANIMAL RIGHTS CRUSADE (1992).

278 *See, e.g.*, Levy, *supra* note 2, at A1 (chronicling ten-year history of ACT-UP's "audacious media events").

279 *See, e.g.*, S. REP. NO. 103-117, at 12 (1993) (chronicling the activities of anti-abortion protesters, including civil disobedience); SUZANNE STAGGENBORG, THE PRO-CHOICE MOVEMENT (1991) (chronicling the activities of the pro-choice movement, including civil disobedience).

280 The news burgeons with accounts of recent acts of civil disobedience on a wide range of topics. *See, e.g.*, BALTIMORE SUN, Jan. 11, 1996, at 2A ("More than 130 people were arrested at Yale University yesterday for blocking a street in a show of civil disobedience over the university's treatment of graduate students."); *Disabled Demonstrate*

American political dialogue. Although it is lawbreaking, civil disobedience enjoys a level of public acceptance that distinguishes it from ordinary illegal actions.[281]

To be sure, that the means of communication is lawbreaking means that it likely results in individual and social harms not present when the expression is lawful.[282] Certainly these harms must be part of the constitutional balance that determines whether the government may enforce the law. However, they must be isolated and placed where they belong in the analysis—under consideration of the nature and weight of the government's interest. They are part of the balance, but not alone determinative. The social value of the lawbreaking expression must have a distinct, strong weight in the constitutional balance.

2. *The Importance of the Means of Communication*

That content-directed government actions may silence civilly disobedient expression might not be troublesome if, as seems often to be the assumption, means of communication other than lawbreaking are available and equally effective.[283] Lawbreaking, however, is a unique mode of communication.[284] It

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for Home Care, UPI, Oct. 23, 1995, *available in* LEXIS, Nexis library, UPI file ("Some 400 activists for the disabled are [engaging in nonviolent civil disobedience] in Lansing Monday in support of home-based care alternatives."); *Inside Politics* (Cable News Network, July 20, 1995) (describing civil disobedience and arrests protesting the University of California's proposed abandonment of race as a consideration in admissions).

[281] *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 105 (1985) ("Americans accept that civil disobedience has a legitimate if informal place in the political culture of their community."); Eisele, *supra* note 270, at 26 (describing an act of civil disobedience to protest welfare cuts as "valid": "I was struck by the protesters' courage, conviction and evident compassion for the poor"); Ledewitz, *supra* note 239, at 105 ("[C]ivil disobedience . . . has become an established part of American political life."); Miller, *supra* note 17, at A4 (noting that anti-nuclear protest organizers "have been meeting with [the police chief] about the [planned] acts of civil disobedience").

[282] Yet even when protest speech is lawful, it may cause substantial individual and social harms. *See, e.g.*, Madsen v. Women's Health Ctr., 512 U.S. 753, 774 (1994) (striking down prohibition on all uninvited approaches by anti-abortion protesters of women seeking abortions: "'As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment'" (quoting Boos v. Barry, 485 U.S. 312, 322 (1988))).

[283] *See, e.g.*, TRIBE, *supra* note 54, at 983 (arguing that the draft card-burner O'Brien "[m]ade no showing that alternative, equally effective, ways of expressing his message were unavailable. He could, after all have burned a *copy* of his draft card in front of the very same audience as a means of making the very same point").

[284] *See, e.g.*, Ely, *supra* note 3, at 1489–90 ("[M]uch of the effectiveness of O'Brien's

grabs the majority attention in a way that lawful means may not,[285] signifying not only a distinct substantive message,[286] but also signaling the protester's depth of commitment in an induplicable way.[287] A lone African American woman refusing to move to the back of a segregated bus conveys a different message than if she were to circle the bus stop with a picket sign or distribute handwritten circulars to advertise her protest.[288] The same conclusion, we must acknowledge, holds true for the comparison between the act of bombing the Alfred P. Murrah Federal Building in Oklahoma City as opposed to writing a letter to the editor protesting the injustices alleged to have occurred in Waco.[289]

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communication [derived] precisely from the fact that it was illegal.").

[285] *See, e.g.*, Charles R. DiSalvo, *Abortion and Consensus: The Futility of Speech, the Power of Disobedience*, 48 WASH. & LEE L. REV. 219, 226 (1991) ("Civil disobedience can move people when argumentation and exhortation fail."); *see also* University of Utah Students Against Apartheid v. Peterson, 649 F. Supp. 1200, 1205 n.9 (D. Utah 1986) ("While the mass media often pays little attention to unorthodox or unpopular ideas, dramatic displays of action capture media attention when words alone will not."); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 640 ("[The] kind of stimulus necessary to activate the political conscience of [the] populace sometimes can be created only by transcending rationality and appealing to more primitive, more basis instincts [through symbolic conduct]."); Ball, *supra* note 267, at 40A (quoting a retired truck driver who planned to participate in civilly disobedient acts at an upcoming school board meeting to protest its racism, "[i]f we don't protest, our voices will not be heard").

[286] *See* Williams, *supra* note 75, at 706.

> Where the regulation impacts on an expressive aspect of speech, there are no adequate alternatives. It is true that verbal and written means of expression are left open when symbolic speech is foreclosed. But saying "I hate and resist the Vietnam War" was no more an adequate alternative for O'Brien than if Thomas Jefferson had been forced to write that "The tree of liberty must be refreshed from time to time with the blood of patriots and *very bad rulers*."

Id.

[287] That normally respected, law-abiding citizens feel strongly enough about an issue to break the law and subject themselves to punishment is often an important part of the message. *See, e.g.*, *Inside Politics* (Cable News Network, July 20, 1995) (describing arrests for civil disobedience protesting university admissions policy as "planned in advance, and announced in advance and [involving] six prominent local people").

[288] *See, e.g.*, Barbara Reynolds, *Lessons of Dignity from 40 Years Ago*, DES MOINES REGISTER, Dec. 4, 1995, *available in* 1995 WL 7222778 (describing Rosa Park's protest as arising not from "hurt feet" but dignity).

[289] The sole purpose of this example is to make a point about the message conveyed by illegal conduct. It is not at all clear that the Oklahoma City bombing would qualify as expressive conduct. Neither an intent to communicate nor a message reasonably understandable to an audience are certain. Moreover, the act certainly would not qualify as socially valuable civil disobedience because of its personally-directed violence and the fact

In both instances, the illegal action contributes something profoundly different to the public dialogue than would the legal means of communication.

Of course, that the mode of communication is lawbreaking injects other types of noncommunicative harms into the balance. In the case of the Oklahoma City bombing, which claimed 168 lives and resulted in countless physical and emotional injuries, those harms unquestionably justify the government in absolutely prohibiting anyone, ever, to choose bombing as a means of communicating his or her minority opposition to the actions of the majority-established political order. The fact remains, however, that no other means communicates the same message as breaking the law. Excising it from the political dialogue has constitutionally significant consequences. In many other instances, the Court has recognized the distinct communicative impact of even "distasteful mode[s] of expression."[290] The same should be true even when the means involved breaking the law.

3. *The Likely Lesser Value of the Government's Interest as Applied to Civil Disobedience*

The analytically sound justification for penalty enhancement is that the characteristic that triggers the enhancement, when combined with the base conduct, creates harms "special" and greater than the conduct alone.[291] Where the base conduct is political protest, this conclusion is doubtful. Specific types of enhancements may isolate victim-targeting action,[292] concerted or repeated action,[293] or purposeful action more generally,[294] but where purposefully choosing the victim is for a publicly communicative purpose, it may not result

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that the perpetrator did not willingly accept the punishment for the illegal action.

[290] Cohen v. California, 403 U.S. 15, 21 (1971) (reversing a disturbing the peace conviction of draft protester who wore a jacket into the Los Angeles County Courthouse emblazoned with "Fuck the Draft").

[291] *See* discussion *supra* Part III.C (detailing the proper place of penalty enhancements in the clarified free speech model).

[292] *See, e.g.*, WIS. STAT. § 939.645 (1989–1990) (cited in Wisconsin v. Mitchell, 508 U.S. 476, 480 (1993) (enhancing the penalty for a defendant who "[i]ntentionally selects" the victim according to certain characteristics)); Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248(a)(1) & (c) (1994) (enhancing penalty for a defendant who "intentionally injures, intimidates or interferes" with a person "because that person has been . . . obtaining or providing reproductive health services").

[293] *See, e.g.*, Racketeer Influenced and Corrupt Organizations, 18 U.S.C. § 1962(c) (1994) (enhancing penalty for participating "in the conduct of [an] enterprise's affairs through a pattern of racketeering activity").

[294] For example, punitive damanges are awarded when the defendant is guilty of "a bad state of mind." DOBBS, *supra* note 102, § 3.11(2), at 468.

in the individual or social harms that prompted the enhancement.[295] Concerted or repeated action, when the association or repetition is a tool of public dialogue, may correlate to more effective political expression[296] rather than a coercive criminal monopoly.[297] In addition, whereas purposefulness in lawbreaking usually correlates with greater social evil, such a correlation is less certain with the civil disobedient who purposefully breaks the law to produce dialogue—a social value, along with the noncommunicative harms that incidentally accompany the conduct. All of these considerations mean that, in many particular instances where a penalty enhancement may be applied to civilly disobedient conduct, the triggering characteristic may not effectively segregate more individually and socially harmful behavior from the broader class of conduct that produces the same functional harms.

4. *Disproportionate Viewpoint Impact on Political Dissenters*

The breadth of a penalty enhancement provision may demonstrate that the government did not intend to target political dissenters, but a proper constitutional balance looks to disproportionate viewpoint impact even absent a government purpose to suppress dissent. And penalty enhancement provisions, to the extent that they sweep civilly disobedient conduct within their scopes, surely have such an impact.

In fact, penalty enhancement provisions, as applied to the segregable class of expressive conduct, have the same effect as would a provision that enhanced the punishment for any crime if it was committed "for the purpose of political

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295 The greater individual and social harms that prompt enhancements stem from the fact that the illegal action is individually directed. Specifically, with hate crime enhancements, the additional harms include a greater likelihood of retaliation and greater fear and unrest. These harms seem less likely to occur when an individual like the one in the hypothetical, though chosen for his characteristics, is intended as a public model. The public-directed nature of the conduct would likely diffuse the individually retaliatory impulse as well as be less likely to raise fears of widespread duplication of the conduct against other private individuals. FACE requires slightly different analysis because it was directed against political protest. However, not all protests result in the same individual and social harms. The two-time church meeting protesters of the example would appear to cause individual and social harms of quite a different magnitude and nature than persistent, repeated, often personally violent anti-abortion protesters whose activities prompted FACE's enactment.

296 *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 (1982) ("'[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.'" (quoting Citizens Against Rent Control Coalition for Fair Hous. v. City of Berkeley, 454 U.S. 290, 294 (1981))).

297 *See id.* at 910 ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.").

protest." Specifically, penalty enhancements, as opposed to base penalties, act only upon conduct already illegal for reasons other than those that trigger the additional punishment. Because penalty enhancements apply only to lawbreakers, their application will have a disproportionate silencing effect on political dissenters, as opposed to those who agree with majority rulemaking, as the latter would be unlikely to break the law in order to praise it.

The explicitly discriminatory rule penalizing political protesters would require strict scrutiny under either the current or clarified free speech model.[298] The discriminatory impact of the broader enhancements, however, even without an explicit governmental intent to do so, distorts the marketplace of ideas in a constitutionally significant way.[299] It is most crucial to guard dissenting points of view from unconscious as well as purposeful silencing because the minority viewpoints are the most likely to be ignored in the majority decisionmaking process.[300] Across the board, in any particular instance when considering the adoption of a penalty enhancement provision, lawmakers are likely to be insensitive, or perhaps even hostile, to the interests of whatever small minority may want to communicate their dissent through the means of breaking the law. Penalizing lawbreakers more heavily through penalty enhancement provisions that effectively correlate to their protest purpose disproportionately silences one side of the political debate about the validity of majority rulemaking. As with speech restrictions, this viewpoint impact of a conduct restriction is an important consideration in the constitutional balance.

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[298] The rule falls in the nebulous middle ground between content- and viewpoint-discrimination. In one sense, the anti-political protest rule deals neutrally with all topics of protest. In another sense, it discriminates against an anti-government viewpoint because people holding that point of view are the ones likely to use the means of lawbreaking to register their protest. No matter which characterization is used, however, the rule undoubtedly targets expression and thus would be analyzed as a speech restriction, which would receive strict scrutiny whether the government's action was based upon content or viewpoint.

[299] *See, e.g.*, Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 472 (1980); William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 764–71 (1986); Redish, *supra* note 213, at 130 ("That the expression is regulated for reasons other than its content makes it no less an interference with expression.").

[300] *See, e.g.*, Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 349 (1987) (arguing, in the context of racism, that "unconscious prejudice presents [a problem] in that it is not subject to self-correction within the political process").

B. *Striking the Penalty Enhancement Balance in Particular Situations Under the Clarified Free Speech Clause Model*

Penalty enhancements on top of civilly disobedient lawbreaking presumptively violate the free speech clause both because their trigger is the socially valuable protest purpose and because that purpose, when combined with the base conduct, does not usually result in more harmful consequences than the base conduct alone. Still, the government may justify its enhancement in particular applications, either by showing that the conduct combined with the triggering characteristic does indeed result in special harms beyond those that result from the base conduct or by demonstrating that its interest in uniform enforcement outweighs the free expression interests of the few civil disobedients who may break the law for expressive reasons. The following discussion reviews the considerations that should enter into the constitutional balance with respect to the particular types of penalty enhancements that form the basis for the examples in Part I.

1. *Hate Crime Statutes*

Hate crime statutes bear that name for a reason: Their purpose is to penalize conduct motivated by racial hatred because of the individual and social harm that such motive-based conduct causes. The *Mitchell* Court acknowledged as much in referring to the Wisconsin statute as covering "bias-inspired conduct."[301] Some jurisdictions had explicitly referred to crimes evidencing "prejudice based on race" as the enhancement trigger,[302] but the more recent trend is to adopt the victim-targeting language upheld in *Mitchell*.[303] The broader language, which may include a range of viewpoints within its scope, insulates the statute from attack under the current free speech model.

This broader language also sweeps within its scope the student protesters of the first example. However, a more complex balance must occur for the student protesters than for the defendant in *Mitchell*. Most importantly, the trespass, although illegal as an invasion of property rights, is political expression. The students intend to convey a message that is likely to be understood. That the trespass is expressive does not prohibit imposition of punishment for the noncommunicative harms caused by the broad class of conduct. Consistent with

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[301] Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993).

[302] *See, e.g.*, FLA. STAT. ch. 775.085 (1985); H.R. 4797, 102d Cong. § 2(b) (1992) (proposed federal statute passed by House, but not the Senate, referring to conduct "motivated by hatred, bias or prejudice, based on [certain protected characteristics]").

[303] *See, e.g.*, H.R. 1152, 103d Cong. (1993) (newer House bill tracking the Wisconsin statute's language).

a crucial prerequisite for civil disobedience, the students willingly accept that punishment, but upon accepting the punishment, as well as conforming with the other civil disobedience requirements, their conduct becomes different in a constitutionally significant way from a purely functional trespass. The latter results only in harms that are within the government's broad discretion to evaluate and punish. The former has expressive value, which triggers free speech clause analysis when a further penalty is imposed upon it.

The most deferential inquiry when the government imposes a penalty enhancement is whether the government might reasonably believe that the conduct plus the characteristic triggering the enhancement result in greater harm than the base conduct alone. With respect to the trespass at issue, the question is whether the students' choosing the "owner of property" because of race might likely lead to individual and social harms greater than the base conduct. The harms articulated by the state in *Mitchell* were that the base conduct plus the triggering characteristic led to crimes "more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest."[304] However, none of these harms seem to hold true in the instance of the student protest. Rather, the triggering characteristic acts in reverse, identifying a relatively rare instance where a crime has redeeming social value. Thus, it is possible that the free speech clause inquiry would terminate upon the government's failure to articulate any reason for enhancing the punishment in the particular instance of civil disobedience.

Perhaps, however, the government could articulate some special harms that flow from basing decisions on race in any manner whatsoever,[305] or the government might point to the difficulty of distinguishing rac*ist* from rac*ial* motivation in particular instances and argue the need for uniform enforcement. Assuming these interests to be plausible, the multi-factor balancing inquiry must occur. In this inquiry, the weight, in addition to the existence, of a government interest must be determined. Applied to the example where race-targeting is used for the purpose of promoting racial tolerance, neither of the above interests appear substantial.

Weighing against the government interest is the students' interest in their chosen means of communication. Is there an alternate, similarly effective means for the students to convey their message? No. Lawbreaking is part of the

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304 *Mitchell*, 508 U.S. at 488.

305 This might be something along the lines of enforcing "colorblindness" even as to the commission of crimes. *See* Shaw v. Reno, 509 U.S. 630, 641–42 (1993) (recognizing a modified "constitutional right to participate in a 'color blind' electoral process" under which the government may not separate voters into different districts on the basis of race without compelling justification); *see also* Bush v. Vera, 517 U.S. 952 (1996) (same); Shaw v. Hunt, 517 U.S. 899 (1996) (same); Miller v. Johnson, 515 U.S. 900 (1995) (same).

message. Student sit-ins enjoy a rich history that contributes to the message of any particular conduct,[306] and the illegal conduct will likely publicize their protest in a way they could not lawfully achieve. Applying the enhancement to political protesters will have a disproportionate impact on those with an anti-government point of view.[307] Thus, all of these factors dictate that the free speech clause forbids application of the victim-targeting penalty enhancement to the hypothetical student protest.

Beyond this particular hypothetical application to civil disobedience, which, after all, will be the exception rather than the norm, the demonstrated breadth of the penalty enhancement upheld in *Mitchell* teaches another lesson. Where the special harms that justify a penalty enhancement correspond to a particular viewpoint, breadth is a dubious, and even perverse, guarantee of the provision's constitutionality in its entire range of applications. Specifically, the Wisconsin statute's victim-targeting trigger includes racial, along with racist, motivation. Thus a defendant who victimized recent immigrants of a particular nationality because of a belief that they would be less likely to report the crimes would qualify for the enhancement.[308] Unlike the student protesters, the enhancement trigger does not correlate to a socially valuable purpose. The base act is a functional crime that warrants no free speech clause protection absent a government purpose to suppress a particular point of view. Under the deferential rational basis standard that would apply to such a decision, including the racially motivated criminal with the racist would likely survive constitutional review.

But is this the right result from a perspective concerned with sound government decisionmaking? That is, should the constitutional incentive be to broaden the class to which a penalty enhancement may apply beyond the particular concern that prompted its enactment? The better rule is that the scope of a penalty enhancement should be defined as precisely as possible to mirror the special harms, beyond those that result from the base crime, that justify the greater punishment. If those harms correlate to the perpetrator's viewpoint on a political topic, then the constitutional analysis should explicitly recognize the

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306 *See* Brown v. Louisiana, 383 U.S. 131 (1966) (recognizing expressive value of sit-in); Ledewitz, *supra* note 6, at 501 ("The sit-in has been a familiar aspect of political protest since the 1950s.").

307 *See supra* note 225. The line between content- and viewpoint-impact is murky. The class of anti-government protesters may be seen to represent a distinct viewpoint as against those who support the established order. Yet within the class of anti-government protesters may be those who evidence racial hatred as well as racial tolerance. Because a focus of the free speech clause is to protect dissenters against government repression, the anti-government impact should weigh against the validity of the government action.

308 *See* Weinstein, *supra* note 112, at 364 (positing this hypothetical).

expressive impact of the ostensibly conduct-directed government action. The question should be whether the special harms justify the viewpoint focus. That there are concrete, noncommunicative harms that result from the conduct plus viewpoint-motivation that do not apply if the enhancement is broadened to include other viewpoints on the same topic should weigh in favor of the enhancement's validity. Where those do not plausibly exist, the enhancement must be invalidated as a naked effort to suppress a disfavored point of view.

Such a precisely tailored enhancement might even distinguish between particular instances of political protest, validly applying to some because, despite the expressive value, the special harms that justify the enhancement exist as well. Consider the difference between the student protesters and the white supremacist who, cloaked in Ku Klux Klan garb, carries a burning cross onto an African American family's lawn, sits, and respectfully waits to be arrested. Both acts are civil disobedience, but the racist motivation of the latter must impact the constitutional analysis because it results in additional individual and social harms beyond the base trespassing conduct.

Some may be uncomfortable with a distinction between the two acts of political protest. Indeed, it smacks of governmental viewpoint discrimination which is supposed to be the greatest constitutional evil. To alleviate this impression, it is crucial to recall that forbidden governmental viewpoint discrimination targets expression, not the additional nonexpressive consequences of motive-based conduct. The latter, if they truly exist, may justify a penalty that disproportionately impacts those who hold a particular political point of view. In both the student protester and the Ku Klux Klan examples, the government was presumed to be able to articulate nonexpressive "special harms" that justified the enhancement, thereby invoking the content-neutral balancing test rather than strict scrutiny review. Pursuant to this balancing test, the student protesters would likely prevail whereas the government interest in eliminating the harmful consequences of the cross-burning would likely outweigh the social benefit of the expression.

In either case, it is the particularized balance that must determine the outcome, rather than broad generalizations. Cloaking the enhancement provision with a generalized description that includes instances where bias is not the motive provides a false guarantee of fairness. The government more harshly penalizes criminals who may not deserve the punishment so as to appear viewpoint neutral. Free speech clause analysis should not encourage this ploy. Rather, the analysis should promote careful tailoring. This means that sometimes enhancements specifically stated in terms of viewpoint will be constitutionally superior to broader enhancements because they more precisely address the government's legitimate, nonspeech-based interest.

2. *Federalizing Enhancements*

a. *FACE*

The lower courts that have examined FACE have found it constitutionally valid because it is directed at unprotected activity[309] and because it does not discriminate on the basis of political viewpoint.[310] As applied to acts of civil disobedience, both of these conclusions are questionable. First, accepting the base punishment for illegal conduct transforms civilly disobedient lawbreaking into socially valuable expression.[311] It is unprotected from imposition of the base penalty, but is protected from imposition of an enhancement absent a balance in which the harms flowing from the conduct because of its protest motivation outweigh its expressive value.[312] Second, even absent a government intent to discriminate on the basis of viewpoint, such a viewpoint discriminatory impact is the result of FACE's application. It is pro-life activists who prompted FACE's enactment, and it is to pro-life activists that FACE primarily applies.[313] Thus, neither of these observations provide the final conclusion as to whether FACE may be applied to instances of civil disobedience. Rather, a multi-factor balance must determine if the harms of the conduct outweigh its value and thereby justify the penalty enhancement.

It is first necessary to clarify exactly which type of abortion protest activities may qualify as civil disobedience. These are activities where participants openly break the law and accept the punishment in order to send a public message. Many of the abortion protest activities, specifically those cited in favor of the statute's enactment, do not meet this definition, either because the acts involve personally directed violence[314] or are covert,[315] because they

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309 *See, e.g.*, American Life League, Inc. v. Reno, 47 F.3d 642, 648 (4th Cir. 1995) (stating that FACE "target[s] unprotected activity").

310 *See, e.g.*, United States v. Dinwiddie, 76 F.3d 913, 923 (8th Cir. 1996) ("FACE's motive requirement does not discriminate against speech or conduct that expresses an abortion-related message.").

311 *See* discussion *supra* Part III.B.

312 *See supra* Part III.A.2 and Diagrams D and G (clarifying the free speech model so that government actions impacting expressive conduct must undergo the same multi-factor balancing test that applies to content-neutral speech restrictions).

313 *See, e.g.*, *Dinwiddie*, 76 F.3d at 923 (noting, and seeming to accept, defendant's factual assertion that "the vast majority of people whose conduct [FACE] proscribes are opposed to abortion").

314 *See, e.g.*, RAWLS, *supra* note 11, at 366 ("To engage in violent acts likely to injure and to hurt is incompatible with civil disobedience as a mode of address.").

315 *See supra* note 238 and accompanying text (noting that civil disobedience must be public and open in order to constitute socially valuable expression).

are not engaged in for the purpose of expression,[316] or because the expression is not publicly directed.[317] The question remains, however, whether FACE may validly apply to those protest activities that meet the definition of civil disobedience.

As public expression on a political issue, abortion protest contributes to public dialogue. Because lawbreaking is a unique means of expression and the site of protest adds symbolic significance to the expression, enhancing the penalty for such protest actions will detrimentally affect the richness of public debate. Moreover, as noted above, enforcement of FACE's penalty enhancements will disproportionately affect not only the class of persons opposed to government policy in general, but those opposed to abortion in particular. These factors create the presumption that civilly disobedient abortion protests outside abortion clinics should be protected from penalty enhancement.

However, the legislative history[318] and judicial opinions[319] contain extensive documentation of the harms caused by abortion protests. Although many of these harms will not result from activity that qualifies as civil disobedience, some will. The issue is whether these harms are great enough to outweigh the factors in the constitutional balance that presumptively protect civil disobedience from penalty enhancement. Viewed on a case-by-case basis,

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316 *See, e.g.*, S. REP. NO. 93-117, at 11 (1993) ("The express purpose of the violent and threatening activity described [in this report] is to deny women access to safe and legal abortion services. Anti-abortion activists have made it plain that this conduct is part of a deliberate campaign to eliminate access by closing clinics and intimidating doctors.").

317 Much of the protest outside abortion clinics is directed toward the individuals seeking abortions and those providing them, rather than toward the general public. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 769 (1994) (distinguishing between "focused picketing" and "generally disseminated communication"); Terry v. Reno, 101 F.3d 1412, 1414 (D.C. Cir. 1996) (referring to the "'sidewalk counseling'" offered by protesters to women entering abortion facilities (quoting Plaintiff's complaint)).

318 *See* S. REP. NO. 93-117, at 15 (1993).

319 A New York district court has stated that:

> [T]he risks associated with an abortion increase if the patient suffers from additional stress and anxiety [caused by abortion protest activities]. Increased stress and anxiety can cause patients to: (1) have elevated blood pressure; (2) hyperventilate; (3) require sedation; or (4) require special counseling and attention before they are able to obtain heath care. Patients may become so agitated that they are unable to lie still in the operating room thereby increasing the risks associated with surgery.

Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1427 (W.D.N.Y. 1992), *aff'd sub. nom.* Pro-Choice Network v. Schenck, 67 F.3d 359 (2d Cir. 1994), *vacated in part on reh'g en banc*, 67 F.3d 377 (2d Cir. 1995), *cert. granted*, 116 S. Ct. 1260 (1996), *aff'd in part, rev'd in part, and remanded* 117 S. Ct. 855 (1997).

and especially with respect to purely peaceful obstruction, these harms probably do not rise to this level. On a one-time basis, peaceful obstruction carries the harms of a simple trespass: It creates annoyance, inconvenience, and a temporary interference with private rights, but not much more than that.

Yet the history of protests that led to the enactment of FACE is something quite different than one-time peaceful protest. It is sustained, persistent, often individually directed, and sometimes life-threatening activity.[320] The individual and social harms that flow from this series of activities are importantly different from sporadic protests. Repetition weakens the resistance of the individual targets, thereby magnifying the harm of any particular action. The background activities form a fear-inspiring context against which any particular activity is perceived. Part of this context is that initially peaceful activities may devolve into threats or violence. This background may legitimately augment the government's interest in uniformly enhancing the penalty for engaging in certain activities that may, in some instances, be socially valuable civil disobedience that does not result in the harms that justified the enhancement's enactment. For all of these reasons, FACE may legitimately apply to the abortion protesters of the example.

This same conclusion is much more dubious with respect to those protesters who, like the Catholic women in the example, disrupt the exercise of First Amendment rights in places of worship.[321] That this provision was added to a statute titled in terms of "clinics" has been cited as evidence of its viewpoint neutrality.[322] In addition, because this provision does not stem from the same type of history of persistent, continuing protest,[323] it may not have the same

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320 *See, e.g.*, *Terry*, 101 F.3d at 1414 ("Reacting to a nationwide pattern of blockades, vandalism, and violence aimed at abortion clinics and their patients and employees, Congress enacted [FACE].").

321 *See* 18 U.S.C. § 248(a)(2) (1994).

322 *See, e.g.*, Michael S. Paulsen & Michael W. McConnell, *The Doubtful Constitutionality of the Clinic Access Bill*, 1 VA. J. SOC. POL'Y & L. 261, 287 (1994) (noting that the additional provision helps, but does not entirely alleviate, their concern that FACE is viewpoint discriminatory).

323 The "place of worship" provision was added in response to ACT-UP's disruption of mass outside St. Patrick's Cathedral in New York, at which 4500 protesters rallied and 111 people were arrested, including 43 inside the cathedral. *See* Jason De Parle, *111 Held in St. Patrick's AIDS Protest*, N.Y. TIMES, Dec. 11, 1989, at B3. Although ACT-UP has conducted a number of church protests, *see* Anne Howen, *ACT UP: Radical Soldiers in the War on AIDS*, WASH. TIMES, Nov. 12, 1991, at E1, its gay rights and AIDS awareness goals cause it to target a much broader range of protest cites than places of worship, *see* Levy, *supra* note 2, at A1 (listing history of "audacious media events" staged by ACT-UP, "such as infiltrating the floor of the New York Stock Exchange, staging a mass 'die-in' in front of the White House and blocking traffic on the Golden Gate Bridge").

viewpoint discriminatory impact as do the clinic-related provisions.[324] Still, it can, like the clinic-related provisions, enhance the punishment for socially valuable civil disobedience, which is a unique means of communication. Therefore, a government interest in addressing harms beyond those caused by the base act of lawbreaking must exist to justify the free speech impact of the enhancement.

However, looking to the example of the church meeting disruption, the additional harms do not appear to be present. The protesters were disorderly and thereby interfered with the group's right to hold its meeting uninterrupted, but the protesters were rounded up reasonably quickly, arrested, and removed. Thus the group members could exercise their First Amendment rights without a health-endangering or psychologically traumatizing delay.[325] None of the group members experienced, or were in reasonable fear of, bodily harm due to the protest. In sum, none of the special harms that prompted enactment of FACE appear to have been present.

Moreover, the absence of a sustained history of frequently threatening and violent protest with respect to the exercise of First Amendment rights lessens the government interest in uniformly applying the penalty enhancement to individual actions that do not meet the profile of those that prompted the enhancement.[326] The relatively few church disruptions by gay activist groups is a slender reed upon which to hang a penalty enhancement provision directed at political protest even as applied to acts similar in nature.[327] However, those protests certainly do not flavor the perception of other protests that may occur on the premises of houses of worship. There has not been the magnitude of

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[324] That is, protesters may interfere with First Amendment rights at a place of worship for the purpose of publicizing many other viewpoints than gay rights.

[325] Compare these effects with Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1427 (W.D.N.Y. 1992) (listing the health risks to women whose access to abortion services is impeded by protest activities) and S. REP. NO. 93-117, at 15 (1993) (noting the "traumatic effects" of abortion protests on women seeking abortions).

[326] Unquestionably, the St. Patrick's Cathedral protest, which prompted the enhancement, was both threatening and violent. *See* John Leo, *When Activism Becomes Gangsterism*, U.S. NEWS & WORLD REPORT, Feb. 5, 1990, at 18 (describing the Sunday mass invasion that included screaming, tossing condoms, spitting holy wafers, and protesters chaining themselves to pews).

[327] In the instance of gay church protests, there is not the alternate functional purpose of the clinic protests of stopping the act of abortion from occurring even without delivering a political message. The purpose of the trespass is solely to express a political point of view. *See* Levy, *supra* note 2, at A1 (describing numerous ACT-UP events, all of which had functional consequences, such as disrupting government services, traffic, or the activities of the stock exchange, but none of which were plausibly directed at the functional goal absent the symbolic significance).

repetition that would weaken the resistance of the individual targets to any particular action. The background activities are not part of an organized effort that would form a fear-inspiring context against which any particular activity is perceived.[328] Nor is there a history of initially peaceful activities devolving into threats or violence.

In sum, the justifications for uniform enforcement of the *clinic* access provisions do not exist with the provisions respecting places of worship. The latter provisions were add-ons, without the extensive documentation of pervasive special harms that can justify applying a penalty enhancement to suppress socially valuable expression. Because the government interest in uniform enforcement of the abortion-related provisions of FACE does not exist with the religion-related provisions, each application of these provisions to expressive conduct, and to civil disobedience in particular, must be separately evaluated to determine whether the balance of factors justifies the enhancement.

b. *RICO*

The Court has noted the dual aspects of concerted action: While it poses "special dangers . . . associated with conspiratorial activity," it is a "foundation[ ] of our society" as a tool for effecting social change.[329] Particularly in the context of RICO, several Justices have cautioned courts applying its provisions "to bear in mind the First Amendment interests that could be at stake" when the defendant's activities constitute political protest.[330] Pointedly missing from the various judicial caveats, however, is a recognition that deliberate lawbreaking—particularly acts of civil disobedience—could be protected from the RICO penalty enhancement.[331]

Instead, the Court's impliedly exact correlation of unlawful with constitutionally unprotected activity condones the lower courts' conclusions that misdemeanors such as trespass or harassment may transform protected protest activities into racketeering subject to the penalty enhancements of RICO. For the lower courts, the automatic equation is between illegal acts and "wrongful

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[328] The reason that previous protests influence the perception of later ones is that they seem to form a united effort. Protests at places of worship by different individuals or groups pursuing different ideological agendas are not reasonably viewed in this way.

[329] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933-34 (1982).

[330] National Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 265 (1994).

[331] *See id.* at 264 (expressing concern that "fully protected First Amendment activity" might result in RICO liability); *Claiborne Hardware*, 458 U.S. at 934 (referring to valuable concerted action as "combin[ing] with other persons in pursuit of a common goal by lawful means").

acts" that constitute Hobbs Act extortion.[332] However, where free expression, particularly political protest, is at stake, "precision of regulation" is required.[333] Speech may be protected even though it is coercive.[334] Under the clarified free speech clause model, the same conclusion should apply to expression through conduct, specifically to civilly disobedient lawbreaking. That is, the point of civil disobedience is to cause the majority to change the policies that it embodies in law. This expressive purpose has social value. The means of expression is breaking the law. Where the protester otherwise meets the requirements for socially valuable civil disobedience, the mere fact of lawbreaking should not transform valuable expression into "wrongful" extortion. Rather, where the protester accepts the base penalty, the respectful, publicly expressive nature of the lawbreaking should counsel against enhancement.

In most instances where the lawbreaking constitutes civil disobedience, the balance of other factors will protect it from constituting a predicate act under RICO. As noted in the other applications, civil disobedience is socially valuable expression conveyed through a unique means. Although the government certainly did not target anti-government protesters when it enacted RICO, application of the racketeering provisions against protesters will disproportionately impact those who disagree with government policies. These factors weigh in favor of protecting expressive lawbreaking from the RICO enhancement.

On the other side of the balance is the government's interest in punishing concerted action, which is a "powerful weapon"[335] that may increase the individual and social harms of any particular action. But when concerted action is for the purpose of delivering a public message, these additional harms might not exist. Specifically, RICO was aimed at the dangers posed by an organized, underground criminal network that credibly threatened violence as a means of obtaining property for the individual benefit of the criminal actors. In the few instances where protesters engage in or credibly threaten personally directed violence through their political expression so that their targets reasonably "fear" for their safety, the government interest in punishing the additional harms that come from concerted action may justify a penalty enhancement. Yet the Hobbs Act's "force" threshold is much lower than violence, and its alternative "fear"

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[332] *See* 18 U.S.C. § 1951(b)(2) (1994) (defining extortion as the obtaining of "property" from another, with his consent, induced by "wrongful use of actual or threatened force, violence or fear").

[333] *Claiborne Hardware*, 458 U.S. at 916 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

[334] *See id.* at 910.

[335] *See id.* at 932.

requirement, which includes fear of business loss or the loss of an intangible right to obtain business services, is much different than a personal safety fear. Both concepts are broad enough that, in application to protest activities, they may fail to identify those that result in significantly greater harms that outweigh the expression's social value when patterned.

The examples indicate two potential applications of RICO to political protest activities. Both involve publicly directed expression on a political topic. Under the clarified free speech clause model, each requires a particularized balance to determine whether the RICO enhancement may constitutionally restrict the expression.

Because the same examples may qualify the protesters for FACE or RICO liability, the particularized multi-factor balance is the same for RICO as for FACE. Specifically, the government interest in restricting the one action of either example is not strong enough to justify the enhancement. But the different history and contexts of abortion clinic protests as opposed to place of worship protests may affect the analysis of any particular application. That is, sustained, continuing, often personally directed and/or violent history of abortion protests may affect the evaluation of whether the access-blocking prayer vigil "wrongfully" causes "fear" so as to result in "extortion." This history also adds significance to RICO's "pattern" trigger, vividly demonstrating the additional individual and social harms that planned, concerted action may pose as compared to sporadic, individual action. As with the application of FACE, this history may justify applying RICO's provisions to the protesters of the example even though their acts might not produce harms enough to justify the enhancement outside this context.

Also, as with the application of FACE, application of RICO to the church protesters is more questionable. No sustained history of obviously "wrongful" conduct forms a background for evaluating the two acts that form the RICO pattern. Rather, they stand alone, cloaked with the values that attend civil disobedience, against the dubious government interest in restricting organized action undertaken for the purpose of public expression. In this balance, the expression should prevail—meaning that protesters may be punished for the nonspeech-related harms that their ordinary trespass causes, but not for the nonexistent additional nonspeech-related harms that flow from their patterned action.

The result in any other case of political protest activities must depend upon a fact-specific balance. Yet crucial to the balance in any particular RICO application is the recognition that civil disobedience has expressive value in the clarified free speech clause model. The line between lawful actions and those illegal for reasons independent of expression may dictate the result on a per se basis when the issue is application of a base penalty. It is too severe, however,

when the subject is penalty enhancement. Although ostensibly directed at conduct, RICO sweeps within its broad scope two characteristics of First Amendment value—expression and association. When the two are combined, the resulting conduct must be presumptively protected from enhanced punishment, subject to a government showing that the patterned action results in additional harms that outweigh the social value of the expression.

3. *Punitive Damages*

In one sense, imposition of punitive damages for civilly disobedient actions presents the same issue as other penalty enhancements: Whether the characteristics that trigger their imposition isolate actions that result in greater harms than the base functional conduct. In another sense, however, punitive damages present a different issue. The constitutional problem with the more specific statutory enhancements is that their defining characteristics might apply to socially valuable expression. But the standard for imposing punitive damages specifically limits their range to "wanton misconduct," that amounts to "a particularly aggravated, deliberate disregard of the rights of others."[336] Because the definition seems to precisely isolate actions grossly more harmful than other functional acts within the class, it seems to solve the constitutional problem.

Although expression- and viewpoint-neutral on its face, the different problem that the broad punitive damages standard poses in application is that political protesters may be punished for their expressive purpose and perhaps for their particular, unpopular points of view.[337] Neither of these reasons constitute additional harms that justify the punitive damages penalty enhancement.

Because civil disobedience is expression under the clarified free speech clause model, a multi-factor balance must determine whether a punitive damages award is appropriate in any particular instance. For the reasons noted above—that it is public expression, conveyed through an unduplicable means,

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[336] Huffman & Wright Logging Co. v. Wade, 857 P.2d 101, 118 (Or. 1993) (Unis, J., dissenting) (quoting UNIFORM CIVIL JURY INSTRUCTIONS § 35.01).

[337] *See id.* In his dissent, Judge Unis stated:

> Put in stark terms, a punitive damages standard that explicitly gives the jury discretion to award punitive damages for a tort that is committed in conjunction with or accompanied by or intertwined with a significant communicative component only if the jury determines that it is in society's best interest to punish and deter the defendant's particular political message accompanying the conduct would impermissibly punish and seek to deter speech.

Id.

and penalizing it will disproportionately affect anti-government protest—civil disobedience is presumptively protected from the punitive damages enhancement. In any particular case, jury instructions must focus on nonexpressive harms and judicial review must balance those harms against the lawbreaking's expressive value. In most instances that involve no personally directed threats or violence, the judicial balance should remove the question from the jury. Where the protest actions are personally directed or, although not personally directed, are persistent so as to weaken targets' resistance, or are mixed with personally directed actions so that the latter taint the reality or perception of the former, a jury question may be presented. Specific questions could focus the jury's inquiry on the types of special harms that may justify the punitive damages enhancement. Answers to these queries then could aid judicial review.

With respect to the example of the environmental protesters, imposition of punitive damages presumptively violates the free speech clause guarantee. As a prerequisite to sending the issue to the jury, the plaintiff must articulate additional nonspeech-related harms that flow from the particular characteristics of the conduct that justify the enhancement.

In the case of a one-time protest, these special harms would not appear to be present. However, environmental protests of the type detailed in the example are not one-time events, but are part of an ongoing movement. They occur with regularity. Camps exist to train environmental protesters in "direct action" tactics. Celebrities are enlisted to participate in the protests to add to their media value. [338] For the reasons noted in the context of abortion protests, this history may affect evaluation of individual events. If the same targets are repeatedly chosen for protests, the government may have a greater interest in protecting against this added harm. If the past protests have been violent or personally threatening, this history may affect the perception of an individual instance. It is not clear that these reasons, which may constitute additional harms in the context of abortion protests, exist in the context of environmental protests. Because the protests are media events rather than functional actions realistically calculated to protect the environment, repeated targeting of the same entity is less likely. Moreover, the protests are targeted at property rather than individuals, and therefore do not impact individual health or safety in the same way as abortion protests.

None of these considerations dictates a conclusion, but all are relevant to the constitutional balance. The crux of the inquiry with respect to imposing punitive damages on top of compensatory damages liability for protest activities must be whether nonspeech-related characteristics of the act that fall within the

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[338] *See, e.g.*, Martinez, *supra* note 2, at B1 (detailing activities of Malibu Action Camp, a four day training in the techniques of civil disobedience).

punitive damages instructions cause the act to result in greater harms than other acts of the same type that lack that characteristic. The answer in most cases of civil disobedience must be "No."

V. CONCLUSION

Civil disobedience is socially valuable expression. When, through any variety of means, the government seeks to enhance the punishment for civil disobedience beyond that applicable to the broader class of actions that cause the same functional harms the free speech clause enters the picture. The first question must be whether the characteristics that trigger the enhancement, when combined with the base conduct, result in additional harms that may justify the enhancement. If so, then under the clarified free speech clause model, a multi-factor balance must determine whether the government's interest outweighs the act's expressive value. Results will differ. But this consequence deserves applause rather than lamentation. The current free speech clause model contains the assumption that lawbreaking is once and forever into the future "unprotected." The clarified free speech clause model distinguishes between civil disobedience and lawbreaking that lacks an expressive purpose. Presumptively protecting the former from penalty enhancement more fully realizes the free speech guarantee.